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{ REPORT
No. 97-956

MINORITY BUSINESS DEVELOPMENT EFFORTS OF THE SMALL BUSINESS ADMINISTRATION

A REPORT

OF THE

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

Together with

MINORITY VIEWS



DECEMBER 10, 1982.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C., December 10, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
The Speaker, U.S. House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a report of the Committee on Small Business entitled, "Minority Business Development Efforts of the Small Business Administration".

The report is submitted with the approval of the full committee.

Best wishes,

PARREN J. MITCHELL, *Chairman.*

Enclosure.

(III)

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DECEMBER 10, 1982.—Committed to the Committee of the Whole House on the
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Mr. MITCHELL of Maryland, from the Committee on Small Business,
submitted the following

REPORT

Together with

MINORITY VIEWS

MINORITY BUSINESS DEVELOPMENT EFFORTS OF THE SMALL BUSINESS ADMINISTRATION

CHAPTER 1.—BACKGROUND AND PURPOSE OF HEARINGS

The Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, chaired by the full Committee Chairman, Representative Parren J. Mitchell (D.-Md.), conducted a series of hearings throughout the Nation in order to ascertain the effectiveness of Federal small and minority business programs. Hearings were conducted on May 21, June 4, and June 10, 1981, and June 16, 1982, in Washington, D.C. In addition, field hearings were held in Los Angeles, Calif. on July 7, 1981; in Chicago, Ill. on July 19, 1981; in Phoenix, Ariz. on September 1, 1981; in Atlanta, Ga. on January 18, 1982; and in Philadelphia, Pa. on March 15, 1982.

The hearing records comprise over 1,100 pages of testimony from over 100 witnesses representing a variety of interests and concerns.

In addition to Chairman Mitchell, other members of the subcommittee are: Representative Neal Smith (D.-Iowa); Representative Joseph P. Addabbo (D.-N.Y.); Representative Henry B. Gonzalez (D.-Tex.); Representative Charles Hatcher (D.-Ga.); Representative Gus Savage (D.-Ill.); Representative Joseph M. McDade (R.-Pa.); Representative John Hiler (R.-Ind.); Representative David Michael Staton (R.-W. Va.); Representative Hal Daub (R.-Nebr.); and Representative Christopher H. Smith (R.-N.J.).

While topics explored during the hearings ranged over the entire spectrum of SBA programs and activities, this report does not attempt to address each such issue. Rather, the committee has elected to devote this first report on this series of hearings to SBA's minority business development efforts. This choice was predicated on two basic considerations. First, in troubled economic times minority business has been traditionally that segment of the economy "hit first, hit hardest, and hit longest." This is due to a variety of reasons including the relatively low asset base of minority firms as compared to their majority counterparts. Special effort, therefore, is crucial in these times in order to preserve and expand the limited progress the Government has made in this area. Second, minority business programs have been substantially modified over the last 2 years. In fact, the new administration made the 8(a) program its first priority for change upon assuming control of the Small Business Administration. It is, therefore, incumbent on this committee to explore the impact of these recent changes.

The SBA programs which have the greatest impact on this developmental effort are the section 8(a) program and the subcontracting program mandated by section 211 of Public Law 95-507. Consequently, this report affords those areas its priority of concern.

CHAPTER 2.—SECTION 8(a) PROGRAM AND CAPITAL OWNERSHIP DEVELOPMENT

BACKGROUND

The Small Business Administration (SBA) was created on July 30, 1953, pursuant to the Small Business Act of 1953, as the first independent agency of the Federal Government established in peacetime solely to advise and assist the Nation's small business concerns. Subsequent congressional action made the SBA a permanent independent agency in 1958.

The act, as amended, provides the statutory basis for the use of set-aside programs authorizing preferential treatment in the award of Government contracts to small businesses. Specifically, section 15 of the act provides that, in order to carry out the purposes of the act, small business concerns shall receive any award or contract or any part thereof which is determined by the SBA and the contracting procurement agency to be in the interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity;
- (2) War or national defense programs; or
- (3) Assuring that a fair proportion of total Government contracts for property and services are placed with small business concerns.

Section 8(a) of the act, however, became the vehicle for providing subcontracts to small and minority businesses, though initially targeted to *all* small firms. This section authorized the SBA to enter into contracts with Government agencies and to arrange for the performance of such contracts by awarding subcontracts (by negotiations or otherwise) to "small business firms or others."

In 1958, SBA issued its first regulations in implementation of section 8(a). These regulations indicated that SBA's section 8(a) power was to be exercised in the event of emergency for the benefit of small business as a class and on a publicized, competitive basis.

Following widespread urban unrest in 1967, the Kerner Commission investigated civil disorder in the inner cities of this Nation. This investigation revealed the fact that in the area of Government assistance to small business, in general, there were truly two societies; "one Black and one White . . . separate and unequal." Consequently, the Commission recommended that the Government encourage business ownership by minorities.

SBA gradually changed the 8(a) program emphasis, beginning in 1969, from hiring the unemployed in ghetto areas to developing successful firms owned by disadvantaged persons. It was broadened to encompass noncompetitive contract support for *disadvantaged* small businesses, though these contracts were not restricted to *minority-owned* firms. In 1970, the administrative regulations were amended to

state that a firm must be owned or be destined to be owned (through a divestiture agreement) by socially *or* economically disadvantaged persons in order to be eligible for an 8(a) subcontract.

In the mid-1970's Congress commenced a thorough review of 8(a) program activities in the context of ascertaining the general effectiveness of all Federal programs designed to assist minority business. Public Law 95-507 (October 24, 1978) represents the results of that effort. This law is the most comprehensive statute ever enacted dealing with minority business development. With specific reference to the 8(a) program Congress found:

(A) That the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) That many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) That such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities;

(D) That it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) That such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) That such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) That such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

On the basis of these findings, Congress mandated that the purposes of section 8(a) were to:

(A) Foster business ownership by individuals who are both socially and economically disadvantaged;

(B) Promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) Clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

SBA regulations were substantively amended to reflect the requirements of the new statute. Accordingly, eligibility for program participation was restricted to small business concerns owned and controlled by socially *and* economically disadvantaged persons. Further, SBA was precluded from taking any firm into the program unless it deter-

mined that sufficient resources were available to promote its competitive viability within a reasonable period of time.

Public Law 95-507 created the Capital Ownership Development (COD) program as the vehicle for promoting the competitiveness of disadvantaged firms. The section 8(a) authority could only be used in the context of the Capital Ownership Development program. In other words, section 8(a) was but one of many tools available to SBA to promote the competitiveness of disadvantaged firms and could only be used if other resources, needed to develop the firm, were available. Such other resources pertain to management, technical and financial services needed to achieve predetermined business plan goals, objectives, and targets designed to overcome the firm's status as "economically disadvantaged".

The most recent amendment to the COD program is Public Law 96-481 (October 21, 1980) which requires closure in a participant's tenure in the program. Prior to program admission, applicants and SBA are required to "mutually" agree upon a fixed period of time after which all program benefits are terminated. Once admitted both parties will seek to correct the firm's impaired ability to compete by developing comprehensive business plans with specific targets, goals, and objectives. The intent was to set the time needed to develop the competitive viability of firms by utilizing *all* program benefits.

Public Law 96-481 was the congressional response to criticism received from many sources that SBA would not establish completion dates for its 8(a) firms. As a consequence, program participation was totally "open-ended." The new law reaffirmed the intent of Public Law 95-507 to use 8(a) authority only to promote the competitive viability of firms within a reasonable period of time.

The 8(a) program has been the subject of intensive criticism throughout the years. However, the committee does note SBA's historic failure to publicly recognize many of the more positive and more productive aspects of the program. John Hall, president, Mark Battle and Associates, testified in regard to the only study of which this committee is aware which empirically supports the premise that the 8(a) program has been generally effective in accomplishing its statutory objectives:

My research reveals that the difficulties have been widely disseminated but the notable accomplishments of the 8(a) program are not well known, are not understood and are not appreciated because the 8(a) story has not been conveyed to the public in a balanced way. . . . The 8(a) program has been effective in:

Providing otherwise inaccessible management experience to thousands of minority-owned firms;

Providing thousands of minority firms with access to an otherwise largely inaccessible government procurement marketplace;

Providing track records for 8(a) firms;

Helping some firms qualify for non-8(a) government and commercial work;

Illustrating that minority firms can perform effectively;

Providing a variety of types of satisfactory technical and financial assistance to participant firms;

Helping thousands of firms increase sales and income;

Helping many firms resolve bonding problems;

Helping many firms improve credit capabilities; and

Expanding the employment and skills mix of 8(a) firms.

Mr. Hall concludes:

Based on the types of developmental needs which exist in minority communities, particularly the absence of sizable programs that help minority entrepreneurs to gain valuable management experience, it becomes clear that the 8(a) program is the most effective Federal mechanism developed to date to increase the market share and viable participation of minority Americans in the U.S. economic mainstream.

ORGANIZATION AND STAFFING

The management of the section 8(a) program and the Capital Ownership Development program established by section 7(j)(10) of the Small Business Act is statutorily vested in the Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB-COD).

Section 4(b) of the act authorizes the Administrator to appoint four Associate Administrators. The section further provides:

One of the Associate Administrators shall be designated at the time of his appointment as the Associate Administrator for Minority Small Business and Capital Ownership Development and shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of this act which provides assistance to minority small business concerns. [*See also*, section 7(j)(10) of the act.]

Section 8(a)(8) specifically provides that 8(a) program eligibility determinations are to be made by the AA/MSB-COD "under the supervision of, and responsible to, the Administrator." The one statutory exception to this general rule is the determination of whether a racial or ethnic group (unnamed in the law) has been subject to prejudice or bias. This determination can only be made by the Administrator "after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development."

Aside from providing general management authority over the sections 8(a) and 7(j) programs, the statute also gives the AA/MSB-COD certain authorities with respect to the entire Federal effort to assist small disadvantaged firms. Section 7(j)(11) provides:

The Associate Administrator for Minority Small Business and Capital Ownership Development shall be responsible for coordinating and formulating policies relating to Federal assistance to small business concerns eligible for assistance under section 7(i) of this act and small business concerns eligible to receive contracts pursuant to section 8(a) of this act.

The authority conveyed by section 7(j)(11) has been used only once in any substantive fashion. With respect to the implementation of the subcontracting program established by section 8(d) of the act, the AA/MSB-COD has the final authority to determine the contested eligibility of firms which represent their status as a small disadvantaged business. Office of Federal Procurement Policy Letter 80-2 (May 9, 1980) provides in relevant part:

The Office of Minority Small Business and Capital Ownership Development in the Small Business Administration has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business and shall answer inquiries from prime contractors and others regarding such eligibility.

Although the statute provides that the AA/MSB-COD is "under the supervision of" and "is responsible to" the Administrator, the AA/MSB-COD reports to the Deputy Administrator and not to the head of the agency. [See Exhibit 1.]

Within the SBA the programmatic functions of the AA/MSB-COD have been organized in a "Bureau for Minority Small Business and Capital Ownership Development." The organizational structure of this Bureau is depicted in Exhibit 2.

According to SBA's Standard Operating Procedure and other information available to the subcommittee, the Central Office Bureau for MSB-COD performs eight basic functions:

- (1) Setting policy, goals, and program objectives;
- (2) Evaluating program effectiveness;
- (3) Advising on the allocation and management of program resources;
- (4) Administering "National Buys";
- (5) Acting as liaison both within the agency among other divisions and external to the agency with other Federal agencies or departments, State and local governments, trade associations and private sector businesses;
- (6) Making 8(a) eligibility determinations, and program "exit" determinations;
- (7) Providing technical advice to the field; and
- (8) Recommending or approving certain program decisions regarding Business Development Expense (BDE), advance payments, "large" 8(a) contract awards and Standard Operating Procedure waivers.

EXHIBIT 1.—U.S. SMALL BUSINESS ADMINISTRATION CENTRAL OFFICE ORGANIZATION CHART

APPROVED: *J. J. Anderson*
DATE: *Aug. 6, 1982*

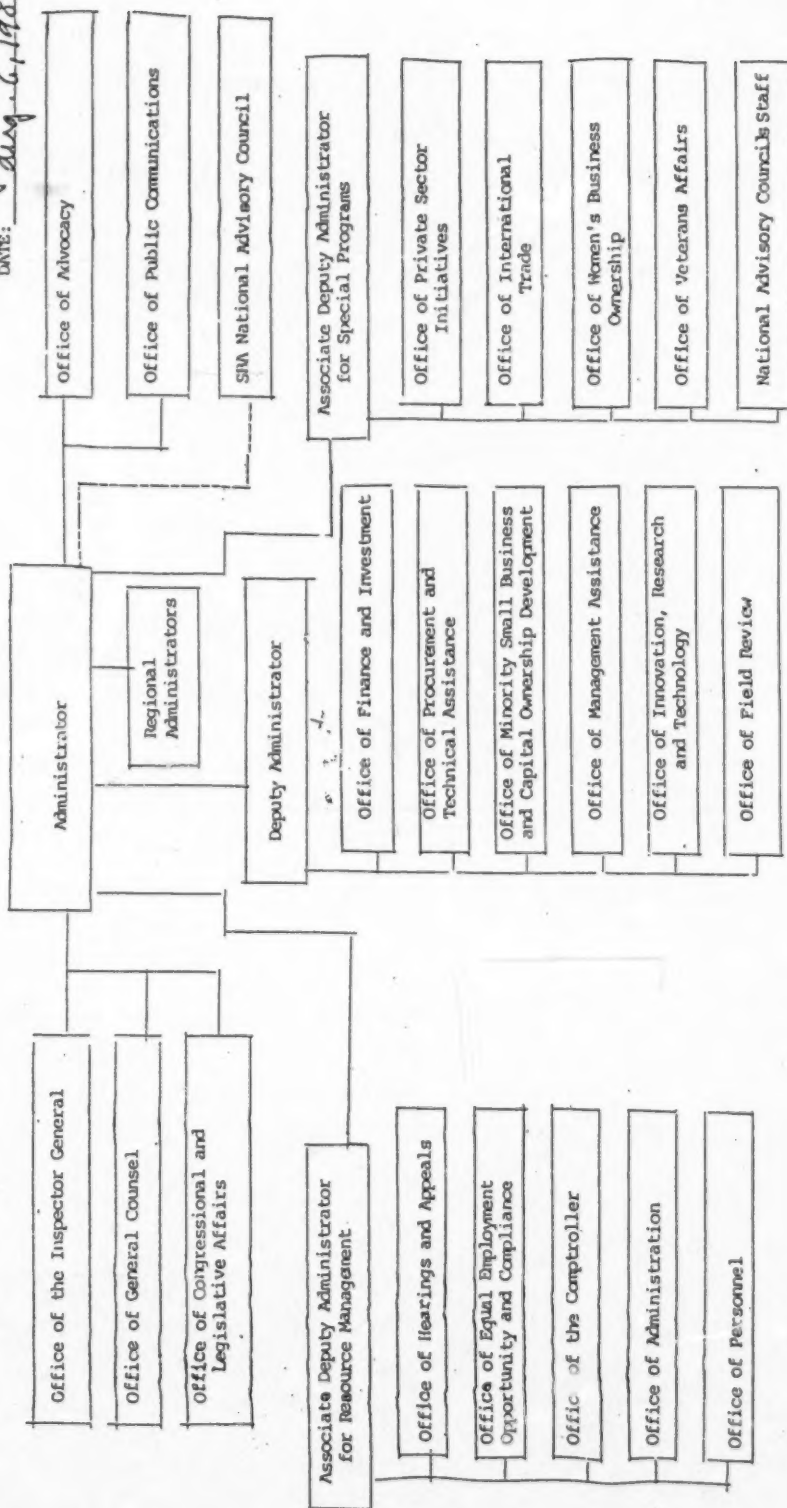
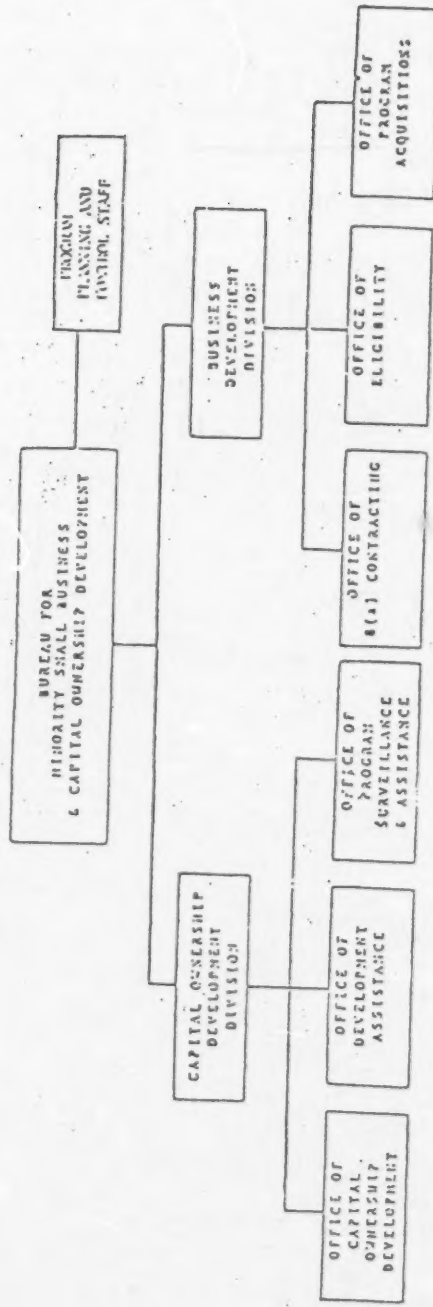


EXHIBIT 2.—MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT
ORGANIZATION CHART



As of July 21, 1982, the number of Central Office personnel assigned to the Bureau was 65. This represents a decrease of 12 positions since February 1981 when the Bureau employed 77 persons. [See Exhibit 3.]

Information recently supplied the committee by SBA indicates that at least 41 employees of the Bureau were the subject of 132 personnel actions between the period of February 1, 1981 and August 1, 1982. Ninety-nine of these 132 actions pertained to "details," and another 10 actions to reassignments. Nearly 83 percent of all personnel actions affecting the Bureau dealt, therefore, with the shifting of job duties and responsibilities. Further, this rapid "turnover" of job functions occurred an average seven times a month.

EXHIBIT 3.—EMPLOYEES IN MSB-COD PROGRAM

	Feb. 28, 1981	As of July 31, 1982
Central office.....	77	65
Regional offices.....	72	76
District offices:		
Business development spec.....	123	136
Contract negotiators.....	32	36
Other.....	96	55
Subtotal districts.....	251	227
Total SBA.....	400	368

The personnel assigned to the Central Office Bureau are divided among four major operating units. As of March 31, 1982, the immediate office of the Associate Administrator employed eight (8) persons or approximately 10 percent of the Bureau's entire workforce. The Program Planning and Control staff employed nine persons for 12 percent of the workforce.

The remaining 78 percent of employment appears to be fairly evenly divided between the Bureau's two major program divisions—Capital Ownership Development which employed 29 persons, or 38 percent of the Bureau's employees; and the Business Development Division which employed 31 persons, or 40 percent of the workforce. The latter division is primarily responsible for those duties of the Associate Administrator relating to section 8(a) program activities. The Capital Ownership Development Division, on the other hand, has primary responsibility for developmental activities conducted pursuant to section 7(j) of the act.

The Central Office primary contact with field office operations takes place with the 10 Regional Offices. Within each Region is an Assistant Regional Administrator for Minority Small Business and Capital Ownership Development (ARA/MSB-COD) and a compliment of MSB-COD support personnel.

On February 28, 1981, there were a total of 72 persons employed by the Regions to perform MSB-COD functions. By July of 1982 this number increased to 76 employees. In fact, of the entire agency workforce of MSB-COD personnel, only the Regions experienced a net gain in employment over the 17-month period. [See Exhibit 3.]

The functions of the Regional MSB-COD personnel include:

- (1) Executing agency MSB-COD policy within the Region's jurisdiction;
- (2) Providing technical assistance to district office personnel and evaluating the distribution of MSB-COD resources;
- (3) Evaluating and monitoring program activity within the Region;
- (4) Coordinating National Buy requirements between districts and the Central Office;
- (5) Approving or recommending certain program decisions regarding BDE, advance payments, sponsorship agreements, and eligibility determinations;
- (6) Executing certain 8(a) contracts within the scope of delegated authority; and
- (7) Approving or declining certain modifications to 8(a) business plans.

With very few exceptions, the Regional MSB-COD staff perform purely support functions with respect to district office operations. Statistics demonstrate that there is one Regional MSB-COD support person for every 2.99 district office MSB-COD line employees.¹ This represents a decrease in the ratio from 1 to 3.49 in February of 1981.

EXHIBIT 4.—RATIO OF REGIONAL MSB-COD PERSONNEL TO DISTRICT MSB-COD PERSONNEL

	Number in regions	Number in districts	Ratio regions: districts
As of Feb. 28, 1981.....	72	251	1:3.49
As of July 31, 1982.....	76	227	1:2.99

Actual program delivery takes place in the various district offices. Initially, program applications must be filed and processed in the districts. Contract identification, matching, negotiation, execution and administration for program participants primarily takes place at this level, as well as developmental efforts concomitant to the exercise of both 7(j) and 8(a) activities. Although districts have the "brunt" of program delivery, the number of MSB-COD district personnel has declined from 251 in February 1981 to 227 in July 1982, or 9.6 percent.

At the district office level, program delivery is divided between two "categories" of MSB-COD personnel. Business development specialists (BDS) are responsible for providing a range of business development support activities for an assigned 8(a) portfolio. Contract negotiators (sometimes referred to as "contract specialists") are responsible for 8(a) contract negotiation, documentation, follow-up and some contract administration functions.

As of June 2, 1982, the average number of 8(a) firms in a BDS portfolio was 18. However, typically, there is only one contract negotiator for each 46 firms. [See Exhibit 5.] In fiscal year 1981, SBA awarded 4,917 8(a) contracts and executed 10,813 contract actions for a total value of nearly \$1.9 billion.

¹ If Central Office MSB-COD personnel are added, the ratio of support personnel to line personnel is 1:1.6.

Exhibit 5 demonstrates the disparity in the number of MSB-COD personnel assigned to various field offices. For example, in Region 8, there is one BDS for every 8 section 8(a) firms; in Region 3, the ratio is one to 39. Region 2 has one contract negotiator for every 25 firms; Region 3 has a ratio of one to 99.

EXHIBIT 5.—REGIONAL STAFFING AND PORTFOLIO QUANTITY (JUNE 2, 1982)

	Number of BDS's	Number of contract negotiators	Number of firms	Firms per BDS	Firms per CN
Region:					
I.....	7	3	120	17	40
II.....	18	7	178	10	25
III.....	15	6	592	39	99
IV.....	12	4	182	15	46
V.....	18	7	222	12	32
VI.....	15	8	266	18	33
VII.....	10	2	80	8	40
VIII.....	10	3	140	14	47
IX.....	15	6	321	21	54
X.....	7	3	176	25	59
Total.....	127	49	2,277	¹ 18	¹ 46

¹ Average.

WASHINGTON DISTRICT OFFICE STAFFING AND PORTFOLIO

	BDS	Contract supervisor	Contract negotiator	Number of firms	Firms per BDS	Firms per CN
BDS supervisor: 1.....	7	1	¹ 2	345	49	172

¹ Was 4; 1 retired, and 1 central office transferee never reported.

It should also be noted that the District of Columbia District Office has a portfolio of 345 8(a) firms; more firms are serviced by this *one district* than any other *Region*.

While the SBA's Standard Operating Procedure requires that the BDS establish and maintain liaison with other agency divisions such as management assistance and the finance division, we have found no authority holding such other divisions specifically responsible for any part of the development of 8(a) firms. In addition, while certain 8(a) "goals" are imposed on each district office, these goals appear designed more to prevent program abuses than to achieve any predetermined standard of competitive viability for 8(a) firms. Measures of program success are not available and, hence, employee performance is evaluated using other criteria. For example, the aggregate amount of 8(a) contract awards, the distribution of contracts among the portfolio, the amount of 7(j) assistance received by 8(a) concerns, and the timely submission of quarterly financial data, all have been historically used to gauge the performance of MSB-COD personnel. However, the statutory aim of creating competitive minority owned firms—which should be the "sum" of program efforts—has never been reduced to a fixed set of criteria against which program success or employee performance could be measured.

PROGRAM ENTRY

Pursuant to 13 C.F.R. § 124.1 there are five basic requirements for program entry. They are:

(1) The applicant business must be a small business concern as defined for purposes of government procurement programs (see 13 CFR § 121.3-8);

(2) The applicant business must be owned and controlled by an individual or individuals deemed to be socially and economically disadvantaged citizens. Such ownership must be evidenced by owning at least 51 percent of the voting stock, if a corporation, or, if a partnership, at least 51 percent of the partnership interests. The disadvantaged person(s) must also demonstrate that they control the management and daily business operations of the concern;

(3) The owner(s) must be socially disadvantaged. Socially disadvantaged persons are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. Either by law or regulation members of the following racial or ethnic groups are presumed, absent contrary evidence, to be socially disadvantaged: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Asian Indian Americans. Individuals, not included in such groups, must establish social disadvantage on a case-by-case basis;

(4) The owner(s) must be economically disadvantaged. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same line of business and competitive market area who are not socially disadvantaged. All determinations of economic disadvantage are based on a case-by-case analysis. There are no legislated presumptions in favor of any group; and

(5) The applicant business concern must have a potential for success. This involves a two-part test. SBA must determine that the concern, with contract, financial, technical and management support will be able to successfully perform 8(a) contracts and with such assistance have reasonable prospects for success in competing in the private sector. Secondly, SBA must also determine that the procurement, financial, technical and management support necessary is available from SBA or other identified and acceptable sources to enable the applicant concerned to complete the program successfully.

The testimony received indicated that the criteria listed above are not always applied in a uniform fashion. In particular, determinations of economic disadvantage and potential for success have not been reduced to objective evaluation factors, thereby raising a problem of inconsistent determinations. Applicants are provided no real guidance of the nature or quantum of proof needed to meet these standards.

Ferguson-Bryan and Associates, Inc., represented by Leonard Fuller, testified about a study it conducted for the SBA in an effort

to develop uniform criteria for entry and exit from the 8(a) program. That study concluded, among other things, that:

SBA had no consistent basis for determining eligibility for or preparedness to complete the 8(a) program . . . decisions concerning program entry and evaluation were characterized by over-reliance on single factors, lack of data to support decisions, and subjective judgment by SBA personnel.

Recently, SBA has also adopted a policy decision which would restrict program entry to firms which demonstrate a "high potential for success." However, a precise definition of this term was never received by the committee nor by SBA field offices.

It is, of course, imperative that such guidance be issued in order to avoid further confusion over the application of eligibility criteria. In addition, criteria must not be set so high as to result in the 8(a) program assisting those least in need of help while excluding firms with a lower potential but which have a reasonable prospect for success. Conversely, criteria which is set too low can effectively destroy the integrity of the program. Obviously, a balance must be achieved but, to date, that balance has yet to be defined.

The General Accounting Office has consistently criticized SBA for keeping firms in the 8(a) program "too long," thereby limiting access to other firms which could meet eligibility criteria. However, within the last several months, SBA has initiated a process to "automatically terminate" 402 firms from program participation for the failure to execute a fixed program participation term. As of August 27, 1982, 17 of the 402 firms were removed from the program by consent agreements or terminations; another 221 firms have received letters automatically terminating their participation; the remaining 164 cases are in various stages of processing. In addition, if pending legislation is not enacted or regulatory amendments forthcoming, 23 of the largest firms in the program will be terminated by February 15, 1983. However, despite the fact that so many firms are leaving the program, SBA has only admitted 140 new firms between February 1981 and August 1982.

Other testimony on program entry highlighted the length of time between application and acceptance. At the time of our initial hearings, processing time averaged between 12 and 18 months—although one witness was certified 25 months after applying. Recent information supplied to the committee by SBA states that average processing time is now nearly 7 months. However, these same statistics indicate that total processing time varies greatly from one Region to another. For example, total processing time in Region 3 averages over 21 months while comparable averages for Regions 1 and 8 are only slightly more than 1 month. [See Exhibit 6.] SBA has offered no substantive explanation for this great variance in processing time among its Regional offices.

As of September 10, 1982, the agency had 698 fully completed 8(a) applications in various stages of review. An additional 1,384 preliminary applications (designed to ascertain the availability of contract support) were also pending.

EXHIBIT 6.—AVERAGE PROCESSING TIME, 8(a) PROGRAM APPLICATIONS (BY SBA REGION)

Region:	Number of days		Total processing time
	Phase I ¹	Phase II ²	
1	15	26	41
2	211	80	291
3	437	201	638
4	30	63	93
5	177	52	229
6	20	26	46
7	10	40	50
8		31	31
9	401	156	557
10	83	23	106
Total (days)	1,384	698	2,082
Average all regions (days)	138.4	2.3	208.2
Average all regions (months)	4.6	69.8	6.9

¹ Phase I—Number of days needed to process initial determinations of contract support.

² Phase II—Number of days needed to process business plans after affirmative decision on Phase I.

PROGRAM EXIT

Evidence received by the committee reveals that there exist four means by which a firm may exit the 8(a) program:

(1) Conclusion of the firm's Fixed Program Participation Term (FPPT) or any extension thereof;

(2) Removal of the firm at its request either by voluntary withdrawal or by execution of a Consent Agreement;

(3) Program completion prior to conclusion of the FPPT; and

(4) Program termination prior to conclusion of the FPPT.

Since 1969, when the 8(a) program began, approximately 4,860 firms have become 8(a) certified. Of that number, 818 were admitted subsequent to October 24, 1978 and the passage of Public Law 95-507. As of September 1982, 1,898 firms remained in the portfolio.

From 1969 to present, 2,962 companies have left the program. Of that number, 583 exited subsequent to October 24, 1978—58 through termination, 140 voluntarily, and 385 for failure to negotiate an FPPT. Similar statistics are unavailable for pre-1978 exits. However, the data does establish that SBA has not "graduated" one 8(a) firm for successful completion of the program since at least 1978.

The committee was particularly interested in testimony concerning SBA's process of establishing FPPT dates.

Public Law 94-481 provides, in relevant part, that the Capital Ownership Development Program shall:

Assist small business concerns participating in the program to develop comprehensive business targets, objectives, and goals for correcting the impairment of such concern's ability to compete, as determined for such concern pursuant to section 8(a) (6) of this act within a fixed period of time as mutually agreed upon by the applicant and the Administrator prior to acceptance in such program

Section 8(a) (6) of the act defines an "economically disadvantaged individual" as a socially disadvantaged person "whose ability to compete in the free enterprise system has been impaired due to dimin-

ished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."

It is clear, therefore, that the fixed period of time referred to in the statute is that point in time when a firm is no longer "economically disadvantaged" and, therefore, ready for program completion (graduation).

However, SBA regulations provide at 13 C.F.R. sec. 124.1-1(f):

Fixed Program Participation Terms. (1) In addition to Program Completion and Program Termination, set forth in paragraphs (d) and (e) of this section, every program participant shall be subject to a Fixed Program Participation Term. A Fixed Program Participation Term will establish the ultimate time period during which a concern may remain in the program and the conditions thereof, *regardless of whether competitiveness is reached or Program Completion action is effected.* [Emphasis supplied.]

Instead of complying with the statutory mandate to establish "graduation dates," many witnesses testified, SBA elected to create a fourth exit vehicle from the program (FPPT's) in complete contravention of Public Law 96-481.

The distribution of FPPT's is depicted in Exhibit 7. As can be seen, the average FPPT is only slightly more than three years, with nearly 57 percent of the portfolio scheduled to exit the program in under 4 years.

EXHIBIT 7.—TIME DISTRIBUTION OF FIXED PROGRAM PARTICIPATION TERMS

	Number of firms	Percent of firms
Time ranges:		
12 to 23 months.....	315	16.8
24 to 35 months.....	230	12.3
36 to 47 months.....	519	27.7
48 to 59 months.....	650	34.7
60 months.....	157	8.4
Total	1,871	99.9

Note: Average FPPT is 37.38 mo.

However, issues relating to program completion criteria did arise as a result of SBA's imposition of 5 years as the maximum FPPT. (While regulations allow for an extension to a total of 7 years in the program, SBA has yet to publish a procedure for determining under what circumstances an extension will be allowed.)

During hearings held on May 21, 1981, the committee sought to determine how the SBA arrived at 5 years for a maximum participation term. However, questioning by the committee members did not produce any justifiable rationale:

Chairman MITCHELL. For 2 years, this Small Business Committee and the Congress rejected the idea of a fixed number of years for 8(a) firm participation. Now you have come to the public with a 3- to 5-year figure. What data did you use to arrive at that 3- to 5-year period?

Mr. CARDENAS. I used what I called a good common business sense approach. . . .

On June 1, 1981, SBA published its proposed rule in the Federal Register (46 Fed. Reg. 29251). Final regulations were published on November 23, 1981 (46 Fed. Reg. 57255). The following month, private parties filed suit against the agency in Federal Court alleging that the regulations violate the enabling legislation. *Minority Business Legal Defense and Education Fund v. Small Business Administration*, Civil Action No. 82-0788 (D.D.C., filed March 19, 1982).

In order to determine what FPPT should be assigned a program participant SBA has devised a point system. [See Exhibit 8.] The point system was never published in the Federal Register for public comment. In addition, even though the statute stipulates that the Administrator and the 8(a) firm "mutually agree" upon a term of participation, the point system does not allow for negotiation of any sort. Finally, points are not assigned on the basis of predetermined criteria that a business should meet to establish itself as competitive with other businesses in the same industrial area (section 8(a)(6)), but rather, on the basis of aggregates (not standards) which are then related to a number of years for participation.

EXHIBIT 8.—SBA point system for determining fixed program participation terms

Economic disadvantage (maximum 620 points) :	Points awarded
1. Personal assets (maximum 20 points) -----	_____
2. Business assets (maximum 20 points) -----	_____
3. Personal net worth (maximum 200 points) -----	_____
4. Business net worth (maximum 200 points) -----	_____
5. Personal income (maximum 30 points) -----	_____
6. Business income (maximum 30 points) -----	_____
7. Business profits (maximum 40 points) -----	_____
8. Access to credit and capital (maximum 40 points) -----	_____
9. Bonding capability (maximum 20 points) -----	_____
10. Availability of outside equity capital (maximum 10 points) -----	_____
11. Available markets (maximum 10 points) -----	_____
8(a) support factor (maximum 20 points) -----	_____
Non-8(a) support factor (maximum 20 points) -----	_____
Length of time factor (maximum 5 points) -----	_____
Advance payment factor (maximum 5 points) -----	_____
BDE factor (maximum 5 points) -----	_____
Reliance upon program support factor (maximum 40 points) -----	_____
Grand total (maximum 715 points) -----	_____

SCALE

0-150 points, 4-5 years.
 151-250 points, 3-4 years.
 251-325 points, 2-3 years.
 326-375 points, 1-2 years.
 Over 375 points, 1 year-18 months.

SOURCE : SBA, Standard Operating Procedure 80-05.

The committee did solicit from private sector witnesses their views regarding criteria for program completion (graduation).

Dr. James Walter, Wharton School of Finance, University of Pennsylvania, responded to questions regarding stages of business growth and their relationship to the establishment of program completion dates and criteria. Dr. Walter stated that a firm goes through a loss phase of roughly 10 years, followed by an emerging profit phase of equal duration, for a total of approximately 20 years required to

reach maturity. In addition, he stated that "progress" through these stages should be the criteria for judging the effectiveness of SBA's efforts or the firm's ability to compete in the free market.

I think the real issue is whether the small business is making progress. Consequently, I would heartily subscribe to a review in the 3 to 5 years, a rather serious review of whether or not the small business is generating a flow of product ideas and so on which will in effect at some point give it a chance to reduce its dependence on the 8(a), . . . In essence, you need to allow time. There is absolutely no question about it. The real problem in all of these is to differentiate between the firm that is going nowhere and the firm that has something to offer the economy.

In testimony related to the same issue, Leonard Fuller, of Ferguson-Bryan, recommended:

First and foremost we think the SBA should implement a policy precluding length of time as sufficient basis to determine degree of competitive viability, . . . In our opinion, this speaks more to business maintenance than business development. If our purpose is to maintain a business we could say 1 day, 6 months, 100 years in the program. But if we are talking about truly developing businesses, which I understand is the purpose of the program, I see no way, in my business judgment, we can arbitrarily put length of time on that.

Our private sector witnesses, therefore, were of the opinion that program completion should be a function of how much progress a firm makes toward pre-established criteria of competitiveness in their respective industrial areas. Time, we were told, can be used to measure the effects of development efforts but cannot validly be considered a substitute for them.

BUSINESS PLANS

An applicant for the 8(a) program is required to submit a business plan. As defined by SBA, a "business plan is a comprehensive planning document which clearly describes the business development objectives of the applicant concern and what, how, and where the resources to foster or expand its capabilities to participate in the economy as a self-sustaining profit-oriented small business will be obtained and utilized." Included in the plan is the applicant's yearly estimation of the dollar volume of 8(a) contract support needed to become competitive.

Evidence suggests there is no systematic manner of determining support projection nor SBA's capability to satisfy them. Dennis Brownlee, president, Advance, Inc., studied the distribution of 8(a) contract opportunities and its relationship to SBA automated data systems. He concluded:

Requirements Availability Determination (RAD) is the process by which SBA judges whether the agency can obtain the contract support needed for a firm that is seeking 8(a) approval. Inappropriate RAD decisions have had a devastating impact on the 8(a) program in the past, and were the

result of "best judgments" made by OPA (Office of Program Acquisition) officials who had no data or quantitative analysis on which to base their decisions. These decisions are directly reflected in the performance of the program in generating an overabundance of contract support for a few 8(a) firms and no support for many others. This performance is damaging to the welfare of each firm and to the program itself.

The key problems in the RAD process are:

(1) A totally inadequate base on Federal procurement activity and agency patterns of contracting small businesses in specific product and service areas;

(2) The lack of comprehensive data and analysis of 8(a) applicants' capabilities and business needs;

(3) The absence of data and analysis on the performance of existing 8(a) firms in specific Federal market areas.

The effects of these problems cannot be overstated. If the SBA cannot better evaluate whether or not it can support a firm that is approved for the 8(a) program, then the whole premise of an 8(a) program is untenable. RAD is the process by which this evaluation is conducted, and it must be based on quantitative analysis that provides an objective framework for experienced judgment.

Though an applicant is required to submit a business plan which generally outlines some of the firm's efforts to become competitive, evidence submitted indicates that SBA does not make any commitment of resources needed to assist the firm to overcome its economic disadvantage. Additionally, the Business Development Specialist is not required to construct a correlation between the plan's objectives and the etiology of the owner(s) economic disadvantage.

ADMINISTRATIVE OPERATIONS

The committee conducted hearings outside of Washington, D.C. for the purpose of compiling evidence on SBA's programs as they are implemented and perceived on the local level. The testimony covered the broadest possible range of topics including: business development expense, advance payments, contract "matching," management assistance, policy development, data collection and the special problems of Native Americans and Asian Pacific Americans.

1. Business development expense

The Standard Operating Procedure (SOP) applicable to the Minority Small Business Program defines Business Development Expense (BDE) as "a payment to an 8(a) concern in the interest of the concern's development, approved by the designated SBA official, and restricted to certain approved uses." Preceding this definition is the following statement of philosophy:

The 8(a) program is a business development program. An integral part of this development process is the use of business development expense in appropriate circumstances to allow 8(a) concerns to obtain a reasonable profit in the performance of subcontracts and to purchase needed capital equip-

ment for efficiency and growth. Business development expense can be an effective tool to assist 8(a) concerns to overcome problems related to small size, efficiencies of scale, pricing and lack of access to credit and capital.

BDE may only be used for "price differential," or for capital equipment acquisition, or to defray certain expenses associated with performing an 8(a) contract.

A price differential is the sum of money between the fair market price (set by the buying activity) and the 8(a) firm's submitted price. If approved, the BDE is paid directly by SBA to the buying activity.

In addition to price differentials and defraying certain contract costs, BDE may also be used to purchase capital equipment for an 8(a) firm to perform a specific 8(a) contract. Title to such equipment is vested in the 8(a) firm at the completion of the contract.

In fiscal year 1982, SBA had \$20 million available for business development expense. However, by the end of the fiscal year only \$6.2 million or 31 percent had been disbursed to 8(a) concerns. Preliminary statistics indicate that of the amount disbursed, approximately 30 percent was used for price differentials and the remaining 70 percent was used for capital equipment acquisition. SBA has offered no reason why 69 percent of the available funds were not utilized during fiscal year 1982.

Under applicable SBA procedures, BDE cannot be approved by district offices and regional approval authority is limited to the lesser of:

- (1) \$350,000; or
- (2) 15 percent of the fair market price for price differential or funds to defray other contract costs; or
- (3) 50 percent of the contract price for capital equipment.

Amounts in excess of those specified in (1) through (3), can only be approved by Central office through a rather elaborate and time consuming waiver process.

The SBA procedures also contain a list of prohibited uses for BDE. For example, BDE *cannot* be used for:

- (1) Price differentials on professional and nonprofessional service contracts; dealers and packers are not eligible for BDE for any purpose;
- (2) Contract contingencies arising subsequent to subcontract award or for any reason subsequent to the negotiation and execution of the 8(a) subcontract for which the BDE is proposed;
- (3) Cost overruns or entertainment expenses;
- (4) Any purpose other than price differentials when financing from other sources is available; and
- (5) Defraying the cost of interest expense unless the expense relates directly to an 8(a) contract and other outside financing sources are not available.

As with projecting 8(a) support levels, there is no formal system in place to project the level of BDE support needed by individual contractors or to relate that requested support to predetermined criteria of competitive viability. In addition, BDE is allocated to the regions, not the districts, and is available on a first-come, first-served basis to all firms within the region. Availability is not prioritized in terms of those firms most in need. As a consequence, the less "sophisticated"

8(a) firms—unfamiliar with the system—are often left with no BDE support at all.

Investigation suggests, therefore, that the SBA's procedure dealing with BDE is designed more to prevent program abuses than to achieve any predetermined development objectives for its 8(a) portfolio. The result, we are told, is a cumbersome system, inequitable distributions of program benefits, and the nonusage of available resources.

2. Advance payments

Advance payments, which are authorized by 41 U.S.C. sec. 255, are occasionally used by SBA to assist firms in obtaining the "up-front" capital needed to perform a specific 8(a) contract. SBA defines advance payments as:

Disbursements of money made by SBA to a section 8(a) business concern prior to the completion of performance of a specific 8(a) subcontract. They are made for the purpose of assisting the section 8(a) business concern in meeting financial requirements pertinent to the performance of the subcontract. Advance payments may be made only in instances where they are determined by the regional administrator to be in the public interest, upon adequate security and when the subcontractor's accounting system provides effective control over and accountability for funds. Security shall be in the form of a lien in favor of the Government paramount to all other liens upon the property contracted for, upon the balance in an account in which such payments are deposited and upon property acquired for the performance of the subcontract.

As with BDE, district offices cannot approve the use of advance payments and regional authority is limited to 90 percent of the amount of the section 8(a) subcontract to which the advance payments relate.

Unlike BDE, advance payments are not allocated to the various regional offices. There is no specific "budget line" for this use of funds. Instead, advance payments are paid from the Business Loan and Investment Revolving Fund created by section 4(c)(1) of the Small Business Act with money not specifically authorized for other program activities.

It is obvious that advance payments are critical in those contractual situations which necessitate the substantial expenditure of funds *before* any of the contract proceeds are actually paid to the contractor. The most notable example is an 8(a) fuel oil dealer who must buy his product from major producers (or wholesalers) at substantial expense and with short credit terms, deliver the product to Government installations, bill for the delivery and then wait months to receive payment.

Aside from securing funds prior to actual performance, advance payments also have the advantage of being "interest free" to the contractors thus increasing its ability to perform at a "more" profitable level.

However, over the last several years advance payments have been misused. If administered properly, advance payments should be self-liquidating. All advance payments are deposited in an escrow account as well as all the proceeds resulting from contract performance. Withdrawals from the account can only be made with SBA's "co-signature"

and such permission is withheld pending proof of valid and justified contract expense. Nevertheless, there have been several incidents where advance payments have been used to pay other than valid contract expenses, thereby, leaving advances which could not be liquidated through contract performance.

More stringent controls on advance payments have been adopted over the last 3 years to prevent program abuses. However, since approval authority is not provided district offices, the system still remains somewhat cumbersome and time consuming. Contractors contend that further decentralization of decisionmaking authority needed to expedite the delivery of this service can be effected without sacrificing safeguards against program abuses.

3. Contract "matching"

Contract requirements for use in the 8(a) program may be identified in one of three ways: the SBA may locate a requirement; the buying activity on its own initiative may submit a requirement to SBA; or an 8(a) firm may identify a requirement and "bring it" to the SBA.

We are told that most 8(a) requirements are identified by 8(a) firms. These firms aggressively "self-market" for 8(a) contracts, searching agencies for those requirements most suited to their firms.

The SBA's Standard Operating Procedure provides that once a firm identifies an "opportunity," it may be reserved for that concern if it is consistent with:

- (1) The need of the marketing concern for the specific requirement in light of its plan projections;
- (2) The developmental needs of other concerns in the portfolio in the same or similar type of business; and
- (3) The factors set forth in paragraph 64 (dealing with financial, management, technical capacity and other "responsibility" issues).

In addition to these requirements, the SOP also provides: "Requirements marketed for an individual 8(a) concern by SBA or by the concern may be utilized for the benefit of that concern in an amount not to exceed 125 percent of the annual approved 8(a) dollar amount, provided size standard limitations are not exceeded."

As can be seen from the above cited provisions, field offices exercise a great deal of discretion with the selection of contractors to perform contract requirements. The lack of more definitive criteria has, of course, given rise to complaints that SBA personnel award contracts on a random basis. Others are far more critical, alleging that SBA is totally subjective and awards contracts to favor some and to discriminate against others.

Moreover, the SOP maximum of 125 percent of projected 8(a) support is automatically suspect since, as discussed above, "Business Plans," (p. 17), these projections are not based on objective analyses. Hence, we have a situation where subjectivity is multiplied by 125 percent to arrive at a maximum support level.

Further, size standards are mentioned as a limiting factor, although the application of the existing standards to 8(a) firms is fraught with problems (see "Size Standards," p. 27).

In an attempt to insure the "equitable distribution" of 8(a) contracts, the SBA has adopted an agencywide goal that at least 75 per-

cent of the 8(a) portfolio receive at least one contract a year and that at least 50 percent to 75 percent of 8(a) concerns meet their approved 8(a) support projections (see, *Small Business Administration Mission Statement and Major Agency Priorities*, May 1982). There is no doubt that this goal was intended to affect the "matching process." However, as evidence presented above would suggest, if 8(a) support levels contained in the business plans are not reliable estimates of what is needed to achieve competitive viability, the imposition of these "goals" by the SBA cannot be considered as contributing to the furtherance of the statutory purpose.

4. Management assistance

Pursuant to section 7(j) of the Small Business Act, the SBA is authorized to provide financial assistance to public or private sector organizations which, in turn, will provide management and technical assistance to small business concerns which are either: (a) located in a high-unemployment area; (b) owned by low income individuals; or (c) section 8(a) firms.

Paragraphs (1) through (9) of subsection (j) contain broad grants of authority to effectuate these purposes. Paragraph (10) of the subsection, however, establishes the Capital Ownership Development (COD) program for the exclusive benefit of section 8(a) firms. The COD program is the specific statutory guidance for overcoming the economic disadvantage of section 8(a) firms. The statute mandates that the program:

(1) Assist 8(a) firms develop comprehensive business plans to overcome a firm's economic disadvantage;

(2) Provide 8(a) firms with loan packaging, financial counseling, accounting and bookkeeping assistance, marketing assistance, and management assistance;

(3) Assist 8(a) firms to obtain equity and debt financing;

(4) Establish regular performance monitoring and reporting assistance for 8(a) firms to assure compliance with their business plans;

(5) Analyze and report the causes of success and failure of 8(a) firms and

(6) Provide 8(a) firms assistance in securing bonding.

Congress appropriates 7(j) funds on a yearly basis without specifying the division of funds between 7(j) (1)-(9) and 7(j)(10) activities. Such divisions are made administratively by SBA. Statistics indicate that Congress has supported the 7(j) efforts on a fairly consistent basis but that the agency has not, over the last few years, fully utilized the resources made available by the Congress (see Exhibit 9).

EXHIBIT 9.—SECTION 7(J) APPROPRIATIONS AND OBLIGATIONS

	Appropriation	7(j) (1)-(9) obligation	7(j)(10) obligation	Total obligation
Fiscal year:				
1979.....	\$11,000,000	\$5,570,766	\$5,304,444	\$10,875,310
1980.....	10,000,000	4,818,956	4,981,912	9,800,868
1981.....	10,000,000	2,724,487	1,601,452	4,325,939
1982 ¹	10,000,000	2,526,887	3,157,934	² 5,684,821

¹ Through August 1982.

² The total obligation for all 7(j) activities for fiscal year 1982 was \$5,797,000. The division of funds between 7(j) (1)-(9) and 7(j)(10) for September 1983 was not available to the committee as of the time of publication of this report.

Of the \$3.2 million obligated for 7(j)(10) activity in fiscal year 1982, only \$1.2 million was awarded in the form of cooperative agreements to provide one-on-one counseling to 8(a) firms. The remaining \$2 million was awarded to national trade associations and others to provide a wide variety of tasks.

Most 7(j)(10) grants are not, however, for the purpose of providing one-on-one assistance to 8(a) contractors, as the statute requires. While the projects funded appear, on their face, to be worthwhile, it is clear that 7(j)(1)-(9) funds should have been used rather than 7(j)(10) authority.

5. Policy development

Witnesses expressed concern for what they believed to be the lack of input by minority business entrepreneurs and private sector financial experts into the development of SBA's MSB-COD policies.

The most notable incident offered as an example of this practice was SBA's adoption of a point system for computing fixed program participation terms without publishing that system in the Federal Register for public comment. In addition, witnesses claimed that SBA ignored input from private sector experts regarding the establishment of program completion criteria. As further support of this contention, witnesses pointed out that SBA did not rely on any studies or data whatsoever to justify either the factors to which they assign points, nor the method for assigning points.

In addition to SBA's actions in establishing FPPT's, the subcommittee also noted that many provisions of MSB-COD Standard Operating Procedure could be considered substantive rules under the Administrative Procedure Act but have never been published in the Federal Register for public comment. A recent example was a SOP, dated June 16, 1982, which purported to restrict 8(a) program entry to firms which, among other things, were in business 2 full years prior to applying for admission. When the committee informed SBA that this SOP may, in fact, violate the Administrative Procedure Act, the agency agreed and stated that subsequent eligibility criteria would be published. By memorandum dated June 22, 1982, the Administrator informed all Regional Administrators that the SOP relating to the "2-year rule": "shall not be taken into consideration for eligibility determinations for firms making application to the 8(a) program until further notice." As of this writing such "further notice" has not been issued.

6. Data collection

An improved data collection system on section 8(a) program activity has not been completed by SBA despite an outstanding request of 2 years from the Senate and House Small Business Committees. SBA witnesses informed the committee that a task force had been formed in SBA to recommend action to the Administrator.

Private sector witnesses who had assessed the informational needs of the agency recommended the development of a management information system within SBA to eliminate management problems stemming directly from the absence of a system to collect and process contract data and to generate reports needed to effectively manage the program.

The evidence suggests that, at a minimum, the crucial components of the system are:

(a) An Automated Requirements Processing System as a means of evaluating the suitability of a contract offering for the 8(a) program and assigning it to the appropriate 8(a) firm;

(b) An Automated Forecasting and Requirements Availability Determination as a means of judging whether SBA will be able to obtain the contract support needed for a firm seeking 8(a) approval; and

(c) An Automated Forecasting Processing System as a means of informing Federal procuring agencies of the type and volume of requirements needed by SBA to support the 8(a).

7. Special problems of Native Americans and Asian Pacific Americans

American Indian witnesses appeared before the committee to describe both the economic plight of reservation Indians and their severe problems in obtaining Federal resources to promote economic development. We are told that unique social, economic and legal considerations demand special effort on the part of the Government to deliver services to these communities, which are often located in extremely rural locations very distant from areas of commercial activity. Examples offered by witnesses of problems unique to Indians include: (a) The trust status of Indian land deprives Indians of control over land and resources; (b) Indian reservations have not even token numbers of financial and savings institutions, the result of which is the denial of access to capital sources for development; and (c) there is a near total absence of experienced Indian business operators, managers and technicians, resulting in part from traditional or cultural values not readily adaptable to competitive participation in a capitalist system without re-education.

The special efforts about which the testimony speaks include the provision of greater access for Indian industries to defense contracting opportunities, greater utilization of the positive aspect of the trust status of Indian lands, the need for equitable tax treatment of tribal governments, and a modification of the financial and technical assistance efforts of SBA and MBDA. Tribal governments represented during the hearings stated their firm commitment to work with the Federal Government and asked for a corresponding commitment which would give due recognition to their unique problems.

The Capital Ownership Development Program and specifically section 8(a) authority were viewed as one possible "tool" that could be used in this effort. However, because of the special legal circumstances regarding tribal governments, land ownership, etc., it was suggested that either regulatory or statutory change is needed to address these particular issues. Of course, this recommendation was not made to preclude additional administrative efforts SBA could now implement under existing law and regulation to advocate more aggressively the interests of reservation businesses. SBA could, for example, increase the sensitivity of its personnel to these special issues, and devote more of its program resources (including outreach) to this effort.

Asian Pacific Americans also detailed for the committee the particular economic and social circumstances of their communities which are in need of special recognition by SBA. Language and cultural values which exhort independence and nonreliance on entities external to the local community are factors which demand that SBA make a

special effort to "bring the programs to the people" rather than await the appearance of the client at SBA's "door." Although outreach efforts are required by the statute [section 8(a)(10)] we have found a lack of any meaningful activity to recruit new 8(a) firms in general or Asian Pacific firms in particular. Likewise, we have found a lack of initiative on the part of SBA to enter cooperative ventures with organizations representing Asian Pacific business concerns or to otherwise engage in affirmative measures to assist these communities.

TRANSITIONAL EFFORTS

1. A "Post-completion program"

Numerous Government witnesses testified in support of the administration's strong preference for private sector initiative and socially responsible economic activity. The emphasis on phasing 8(a) firms out of this Government program and into self-reliance was seen as critical to minority economic development. In testimony submitted by the Minority Business Development Agency of the U.S. Department of Commerce, Victor Rivera, Agency Director, explained that the Agency had "reviewed the history of Federal programs which had noble intentions but unrealistic assumptions about entrepreneurial behavior." That review sought to answer the questions of why and how minority business development should be promoted by the Federal Government. In the area of non-8(a) minority firms operating in an open, nonsheltered market, Mr. Rivera stated:

The unusually low business participation rate in the minority community, to a large extent, results from the lingering effects of racial discrimination. These lingering effects have imbedded themselves as imperfections in the free market system. For example, it is generally assumed that markets function properly only if there is perfect access to information and all economic agents act rationally. In fact, minorities have less than perfect access to information and little experience with using information. Likewise there is evidence that decisions about minority firms are often based on stereotype images rather than reality.

Mr. Rivera concluded:

There are *unique* problems confronting potential and existing minority entrepreneurs . . . the Federal Government in cooperation with State and local governments and the private sector, must serve as a catalyst if we hope to overcome this problem in a reasonable period of time.

In response to inquiries from committee members on the anticipated fate of minority business enterprises after leaving the 8(a) program, witnesses offered varying responses.

SBA and MBDA witnesses summarized an Interagency Agreement between the two agencies which purportedly addresses this issue. The agreement, which was signed on March 31, 1982, does contain provisions regarding firms which are in their last year of 8(a) program participation. Both MBDA and SBA pledge:

To participate, as appropriate, in a joint effort . . . during the final year of participation in the 8(a) Business Develop-

ment Program to provide marketing assistance in the private sector arena for 8(a) minority firms.

The agreement does not specify how this is to be done, which responsibilities belong to MBDA and which to SBA, when these "things" are to happen or whether all "final year" 8(a) firms are to be included, or just a select few. In addition, aside from this marketing "assistance," no other special form of assistance is mutually agreed upon for these graduating firms.

With respect to firms which have completed (graduated) the program, MBDA pledges:

To continue to assist socially and economically disadvantaged minority 8(a) firms after they have completed their participation in the 8(a) Business Development Program if they still need management, technical and marketing assistance.

SBA, on the other hand, offers these graduated firms a very similar pledge:

To continue to provide financial, management, marketing, and technical assistance, as appropriate, to those qualifying businesses that remain eligible for SBA programs after they have completed their participation in the 8(a) program.

Aside from the fact that these mutual pledges suffer from a lack of specificity and substance, it is ironic to note that one of the purposes of the Interagency Agreement was to "coordinate . . . program activities" between the agencies.

While there was nearly unanimous agreement among private and public sector witnesses that there should be a "post graduation" program, the committee is not aware of any substantive initiative to create one.

However, the committee is mindful that such a program effort cannot be legitimately constructed unless involved agencies can first determine the level of competitiveness of graduating firms. If former 8(a) firms are placed in this new program merely because they have met their FPPT—which, by definition, is unrelated to competitive viability—then, of course, post program efforts should be designed to overcome the firm's particular economic disadvantage. If, on the other hand, only former 8(a) firms which have successfully completed the 8(a) program (i.e. graduated) are admitted into the post graduate program, the efforts must assume a different character because these firms are, by definition, no longer economically disadvantaged as compared to other firms in the same area of industrial endeavor. In this latter type of situation, post program efforts should assume a far more sophisticated approach dealing with, perhaps, public stock offerings, international trade, technological transfer, mergers, acquisitions, and alike.

2. Tier program

The committee is in receipt of recommendations that SBA administratively establish a tiered approach to 8(a) program delivery.

Generally, this approach would provide that at some predetermined level, 8(a) firms would be expected to compete for some or all of their contract requirements with other 8(a) firms similarly situated. The

intent of encouraging competition between these higher level firms is to test their competitive strengths, and to sharpen their marketing and bidding skills prior to entry into the open competitive market.

While private sector witnesses generally agreed with this concept, some reservations were expressed. For example, the competition of firms which have reached dissimilar levels of competitive viability would result in the "dominant firm" receiving a disproportionate number of available contracts. This could well happen if firms are competed simply on the basis of having identical FPPT's, since FPPT's are not related to competitive viability (see 13 CFR sec. 124.1-1(f)). Initially, therefore, our private sector witnesses suggested that the development of reliable indices of competitive viability are an absolute prerequisite to any tiered program approach.

Secondly, SBA must exercise extreme care to insure that the tier program does not have the effect of violating statutory intent. This could occur if for any reason the contract support needed by a firm to make adequate progress toward competitiveness is not obtained. Witnesses indicated, SBA must work closely with 8(a) firms and private sector experts before implementing such an approach.

NEW DEVELOPMENTS

1. SBA 8(a)/MBDA merger

Witnesses testified in response to direct questions from committee members on the proposal being considered by the executive branch to merge certain minority business development programs of the SBA into the Commerce Department. Both SBA and MBDA oppose the merger arguing that each provides unique resources to the minority entrepreneur. SBA officials pointed out that to the degree joint efforts between the two could be developed, this had already been achieved by the Interagency Agreement. Beneficiaries of both programs argued that instead of consolidation, each program needed to be strengthened and broadened.

2. Size standards

A great deal of evidence was compiled during the earlier hearings on size reviews being conducted by SBA on an admittedly selective basis. Evidence in this area revealed the formation of a list of 60 to 70 section 8(a) companies suspected by SBA to be "other than small" based on SBA procurement size standards. Representatives from the listed companies offered testimony on the adverse impact these size reviews were having on their 8(a) sales. No firm was formally terminated from the 8(a) program on the basis of such size reviews due to an SBA regulation which provided that such decisions were merely "advisory" to the AA/MSB-COD (13 CFR sec. 121.3-17).

On June 16, 1982, however, the General Accounting Office issued a decision which, in effect, held that SBA did not have the legal authority to award 8(a) contracts to other than "small businesses" as defined under relevant regulations (*Computer Data Systems, Inc.* B-205521). SBA asked for and received a reconsideration, but GAO reaffirmed its prior holding (B-205521.3, B-205521.4, July 26, 1982). In addition, on July 30, 1982, the U.S. District Court for the District of Columbia, in a case presenting the same issue, concluded that the

statute did, in fact, preclude the award of contracts under section 8(a) to other than a small business concern. *Systems and Applied Sciences Corp. v. Sanders*, Civil Action No. 82-1834, 82-1966, 82-1969 (D.D.C., decided July 30, 1982).

Prior to the Court decision, SBA contended that, for some unexplained reason, it lacked the authority to promulgate special size standards for 8(a) firms. This assertion was made despite the fact that SBA has the clear statutory authority to issue such standards (see section (3) of the Small Business Act). However, the Court in the above cited case unequivocally stated the obvious interpretation of the statute: "... SBA could have administratively created different size standards for 8(a) as opposed to non-8(a) concerns."

On August 17, 1982, SBA did finally publish an interim emergency regulation (47 Fed. Reg. 35755 et seq.) which provides an alternative size standard based on net worth and net income for presently participating 8(a) firms. The regulation was effective upon date of publication and expires in 180 days.

This regulation will have the effect of keeping 23 of the larger 8(a) firms in the program until February 1983. SBA, however, shows no movement toward the adoption of a permanent alternative size standard for 8(a) firms. In addition, SBA is proposing massive changes in all of its present size standards (47 Fed. Reg. 18992 et seq., May 3, 1982), but did not agree to initiate any analysis of how these new size standards would affect the 8(a) portfolio until requested by this committee. As of this writing, the analysis has not yet been received.

3. Federal acquisition regulations

The Office of Federal Procurement Policy (OFPP) was originally established in 1974 by Public Law 93-400 as a part of the Office of Management and Budget. The initial authorization for the Office was five (5) years.

Section 6 of Public Law 93-400 directed that the Administrator of OFPP "shall provide overall direction of procurement policy" and, further, that the Administrator "shall prescribe policies, regulations, procedures, and forms" for both the direct and indirect procurement of property (other than real property), services (including R. & D.) and construction.

In 1979, OFPP was reauthorized for four (4) more years by Public Law 96-32. However, the powers of the Administrator were greatly curtailed. Now, rather than having the power to "prescribe policies, regulations, procedures, and forms," Public Law 96-83 states:

The Administrator shall provide overall leadership in the development and implementation of procurement policies and the coordination of programs to improve the quality and performance of procurement personnel.

The new Act also requires the Administrator to develop, for submission to the Congress, "a uniform procurement system." OFPP complied with this made in October 1981.

Presently, military purchases are governed by the Defense Acquisition Regulations (DAR) and civilian purchases by the Federal Procurement Regulations (FPR). Pursuant to its statutory responsibility, OFPP is developing the Federal Acquisition Regulations (FAR) as

the single, uniform system of procurement regulations for use of all Federal agencies both military and civilian. The FAR will, therefore, replace both the DAR and the FPR. OFPP has provided the committee with its proposed FAR provisions dealing with small and small disadvantaged business programs.

Those provisions of the FAR dealing with the section 8(a) program adopt the DAR formula for determining the price of 8(a) contracts. The FAR provision reads as follows:

19.906.2 General

- (a) The contracting officer shall estimate the current fair market price of the work to be performed by the SBA's contractor. This estimate shall be based on likely costs under normal competitive conditions and not on lowest possible costs. [For the comparable DAR provisions see 1-705.5 (b)(2).]

The differential, if any, between "likely" costs and the 8(a) proposal are to be met with Business Development Expense (BDE), at the option of SBA. Failure to use BDE under these circumstances will cause the buying activity to withdraw its 8(a) offer.

Present civilian regulations (FPR) base price for 8(a) contracts on what is "fair and reasonable." This system, therefore, allows civilian agencies to be more flexible. By paying a reasonable cost, civilian agencies do not unnecessarily "raid" SBA's limited BDE budget and give due recognition to the fact that 8(a) firms are, by definition, often incapable of competing in an unrestricted market.

OFPP's decision, however, to utilize the DAR pricing system across the entire Federal Government would remove this flexibility and place a severe drain on SBA's resources. This could, we are advised, result in numerous requirements being returned to buying activities since many 8(a) firms cannot meet "likely costs" and SBA's limited BDE would not cover the expected flood of requests for price differentials. SBA has already adopted a policy determination to use most BDE for capital acquisitions with very few program dollars reserved for the payment of contract differentials. In fact, the use of BDE for price differentials on professional and nonprofessional service contracts is strictly prohibited by SBA's Standard Operating Procedures. Despite the magnitude of this potential problem, however, the committee is unaware of any action taken by the SBA to address the issue.

CHAPTER 3.—THE SUBCONTRACTING PROGRAM

Section 211 of Public Law 95-507 (1978), established a subcontracting program requiring large prime contractors of the Federal Government to negotiate or submit subcontracting plans prior to the award of contracts exceeding certain specified dollar amounts. These plans require, among other things, goals for the award of subcontracts to small and small disadvantaged business concerns. The intent of Congress, as expressed in the statute, was to insure that such small concerns "have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." It is an intent, our witnesses informed us, which has not yet been fully achieved.

LACK OF ENFORCEMENT

Section 211 and its implementing regulations do contain ample enforcement provisions. For example, the statute specifies that the failure of any contractor to comply in good faith with the plan constitutes a material breach of contract. Policy Letter 80-2 issued by the Office of Federal Procurement Policy (OFPP) on May 9, 1980, (45 Fed. Reg. 31028 et seq.) further specifies that in the event of a breach the contracting officer "shall review the available facts to determine what remedy is in the best interest of the Government." The policy letter further provides:

Such remedies may include Termination of the contract pursuant to the Termination for Default Clause, negotiated reduction in contract price, negotiation of a revised subcontracting plan to correct deficiencies, or other negotiated measures the contracting officer may deem appropriate.

Moreover, the statute also makes it clear that if the apparent successful offeror or bidder does not submit an acceptable subcontracting plan within the time limits prescribed by the agency, such offeror or bidder "shall become ineligible to be awarded the contract." GAO has held, further, that if a contract, subject to the provisions of section 211, is awarded without a plan, that contract must be considered "legally deficient" and, accordingly, a termination for convenience action may be legally instituted.

Finally, the law also provides that "Prior compliance of the offeror (bidder) with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror (bidder) for the award of the contract."

Despite this array of potential remedies, the committee received overwhelming evidence that prime contractors have, in fact, violated plans with impunity and, further, that many contracts, subject to the requirements of the law, have been awarded without plans.

During fiscal year 1981, SBA field offices reported 537 cases of "interim noncompliance," that is, violations which existed prior to

contract completion and, therefore, susceptible to a "remedy" curing the noted deficiency. However, there were determined to be 61 cases of "final noncompliance," or, in other words, violations that went totally uncorrected. Despite these facts, the committee is not aware of any termination, or reduction of contract price, or future finding of non-responsibility which resulted from these 61 cases.

The blame, our witnesses informed us, must be shared by many. SBA, for example, has only one employee assigned to the subcontracting program in its Central Office although last year, as stated above, over 500 violations were reported to the Washington Office for its review. In addition, the SBA has not aggressively engaged in any cooperative ventures with other agencies to insure swift and equitable enforcement of the law.

Moreover, the committee was told that many procurement personnel employed by buying agencies generally regarded section 211 as a nuisance and refuse to fully enforce the law. In fact, SBA informs us that it still does not receive adequate and timely information on the award of contracts in the first instance and, therefore, cannot totally fulfill its plan review functions specified by statute. Our witnesses were nearly unanimous in their opinion that the perception in the business community is that a prime contractor may violate its subcontracting plan without any fear that sanctions may be imposed.

The committee also received reports that many contracts, covered by the section 211 provisions, have been awarded without plans. While some of these instances have been documented, the total extent of this problem is not fully known. A primary reason for the lack of sufficient data on this issue is SBA's failure to have any reporting mechanism which captures the number of contracts awarded without plans—SBA's compliance forms only pertain to reviews *existing* plans. If there are no plans, there are no reviews, and if there are no reviews, there are no reports. Despite this simplistic and obviously deficiency, SBA, 4 years after the passage of the law, still has not corrected the situation.

LACK OF CONSISTENT INTERPRETATION

The witnesses impressed upon the committee the need for consistency in program operation. There was no doubt among our witnesses that the lack of consistency has led to varying statutory and regulatory interpretations, thereby impeding the full accomplishment of statutory purpose.

For example, although the statute is now 4 years old, there is still no uniform checklist in use for all agencies to assess the acceptability of plans; there are no uniform procedures applicable to the breach of a subcontract plan; no consistency in reporting instructions; and no consistency in the interpretation of "flowdown" requirements nor the use of incentive clauses. OFPP which, by law, is intended to provide a "leadership" role in the formulation of Federal acquisition policy, only responds to section 211 issues as pressure builds over certain problems. It does not initiate. Moreover, the evidence suggests that this office does not give small and small disadvantaged business the same degree of access or quality of concern which it affords to large business. OFPP's lack of initiative and failure to properly consider the

views of small business have clearly contributed to poor program administration.

SBA, however, must, once again, share some of this responsibility. The committee is not aware of any substantive initiatives undertaken by the agency to cure those inconsistencies noted above. In fact, SBA does not even display consistency with respect to its own internal operations. For example, the Central Office normally imposes subcontracting program goals on its district offices which require that a certain number of plan and program reviews be conducted during a given fiscal year. The goals do not specify which prime contractors are to be reviewed or how frequently program audits are to take place. Further, the goal for plan reviews does not specify how many plans per large contractor are to be reviewed or that contracts having a higher dollar value should be more likely to be reviewed than contracts which merely meet or barely exceed the statutory threshold. Consequently, a district office employee could visit only a few very large contractors during a given year and meet or exceed the office's subcontracting program goals—while the great majority of primes could escape scrutiny altogether.

Further, the committee is in receipt of complaints that SBA does not properly coordinate its visits to prime contractors with the cognizant contract administration office (ACO). Contractors cite instances when they have undergone duplicative audits of the very same plans merely due to the fact that the SBA employee and the ACO elect to visit the contractor on different days.

LACK OF OUTREACH

Our small and small disadvantaged business witnesses complained of the Government's failure to disseminate information concerning potential subcontracting opportunities. In fact, during the hearing held in Chicago on July 18, 1981, an SBA witness testified that although the agency had knowledge concerning potential subcontracting opportunities, there is no formal system in place to convey that information to the small business community.

In addition, despite the fact that SBA has varied financial and management assistance programs, it has not undertaken any formal effort to work in concert with prime contractors to "qualify" small and small disadvantaged businesses as potential subcontractors. For example, a prime could specify to SBA the noted management or financial deficiencies of a small business concern which preclude its qualification as a potential subcontractor to that prime. SBA could, thereafter, provide such management, technical or financial assistance as may be necessary to remove those deficiencies, thereby making the small firm "qualified." However, initiatives along these lines appear to be nonexistent.

When the Congress enacted Public Law 95-507, it did express its specific concern about outreach efforts to increase small and small disadvantaged participation as both Federal and private sector subcontractors. In fact that statute created a National Advisory Committee comprised of five representatives from majority business concerns and five minority business representatives to be appointed by the President. The purpose of the committee is to devise ways to encourage the placement of subcontracts with small businesses: (1) located in

labor surplus areas; (2) owned by socially and economically disadvantaged persons; or (3) which are section 8(a) concerns.

Our witnesses informed us, however, that the representatives of the Advisory Committee and their work remain a mystery. In fact, an official of the Independent Truckers of Greater Chicago testified:

We have seen no record of the existence of these representatives, nor have we received any information flow, or information dissemination as to program input. We believe that more information on this subject should be made public and available.

This committee, likewise, has not been the recipient of any information, findings or recommendations from the Advisory Committee since receiving its first annual report in April 1981. However, that report fell far short of the intended purpose of the law since it did not contain any recommendation or findings relating to private sector subcontracting.

THE CONCERNS OF LARGE BUSINESS

In the course of its investigation the committee did solicit and receive testimony from large Federal prime contractors regarding their experiences with section 211 subcontracting. Generally, the problems noted above dealing with inconsistent interpretation and implementation of the law are also shared by these large business concerns. However, they did, in addition, raise a number of other issues.

Many large defense contractors are in favor of a statutory amendment which would require the submission of annual subcontracting plans as opposed to contract-by-contract plans. They argue that annual plans will greatly reduce paperwork, and thereby free the prime contractor to engage in more aggressive outreach efforts to recruit and qualify potential small and small disadvantaged business as subcontractors. They claim that the present program is more "paper" than "substance." In fact, some primes have even suggested a pilot program with a few DOD contractors using annual plans in order to "prove" their point.

Small and small disadvantaged business, on the other hand, oppose annual plans claiming that:

(1) Contract-by-contract plans more realistically reflect the potential for subcontracting opportunities than annual plans which must, by necessity, be based on yearly projections of anticipated sales to the Government and the projected portion which may be captured by small and small disadvantaged business;

(2) The only reasonable remedy for a violation of an annual plan would be debarment from all Government contracts—an extremely unlikely event—whereas remedies for violations of individual plans would pertain to individual contracts and, therefore, would be more flexible and more likely to be imposed; and

(3) The use of annual plans will be the start of a return to conditions as they existed prior to Public Law 95-507. The program would, therefore, be relegated to a "good faith," "best efforts" approach, lacking any substance. Accountability would

be lost, they contend, because annual goals are not "traceable" to specific contracts.

Reporting requirements are a major reason for large prime contractors wishing to use annual in lieu of contract-by-contract plans.

Present reporting requirements under section 211 involve the use of two different forms. The first is the SF 294, which requires reporting under each prime contract with a plan. This report is due on a semi-annual basis. The second report, SF 295, is a summary report on all subcontracting, and is due on a quarterly basis.

Many large defense contractors urge that all reporting be done on a semiannual basis whether or not Congress elects to change the requirement specifying annual plans in lieu of contract-by-contract plans. They argue, once again, that the present paperwork requirements are simply too onerous.

Government agencies, however, generally oppose semiannual reports of summary activity, claiming that program management would be impaired if data were received on such an infrequent basis. They claim that quarterly data can be readily used to quickly establish a contractor's trend of performance and, therefore, that program reviews can be easily targeted to those large contractors with lagging performance. However, the committee did note that SBA does not use the quarterly data to schedule its reviews, although some buying agencies may, in fact, do so.

Large prime contractors also expressed concern about the "flow-down" requirements of section 211. This provision of the law requires that a large prime contractor, subject to the requirements of section 211, must require its large subcontractors, receiving subcontracts exceeding the threshold amount, to adopt a subcontracting plan similar to that of the prime.

Many prime contractors do not want the responsibility to either review or approve such plans or to monitor the performance of their large subcontractors against their plans. OFPP has provided some guidance on this issue, but the Defense Department has yet to decide its position. Primes, however, argue vehemently that they have extremely limited legal authority to monitor or compel the performance of their subcontractors and, further, that the Government should be responsible for the implementation of conditions it has imposed, especially since its enforcement powers are far more expansive.

Large business also cites a series of situations it believes the law has neglected to address or address fully. They contend that Public Law 95-507 has raised the expectation of small and small disadvantaged concerns to receive increased subcontracting opportunities. However, they claim, the statute does not require nor contemplate that the existing suppliers to a large firm be displaced in favor of small or small disadvantaged business nor that the prime award subcontracts on other than a competitive basis—that is, pay more in order to award subcontracts to small business. These issues, large businesses assert, are causing extremely serious problems in terms of their relationship with the small and small disadvantaged business community.

The evidence did suggest that the Government's actions in this area are totally insufficient. There is little or no initiative to translate the increased opportunities provided by the law into actual subcontract awards to small and small disadvantaged business concerns.

IS THE LAW WORKING?

While our witnesses did cite several very serious problems with the implementation of section 211, the general consensus was that the law has had limited success and that this success could be greatly expanded in the future if the Government undertakes appropriate corrective actions to solve those problems noted above.

However, it should be noted that some large firms have had more success implementing section 211 than others. For example, at hearings held in Phoenix, Ariz., a witness representing Motorola testified that:

We have always spent about half of all of our dollars for goods and services with small business.

Of this amount that we spend with small business, at this time, about 6 percent is spent with small disadvantaged business. This 6 percent has grown from 2 percent five years ago. We believe that Public Law 95-507 has been a factor in this growth.

Prior to Public Law 95-507 being passed, we considered ourselves an affirmative action contractor. Yet, nevertheless the enactment of the law has provided the motivation to triple our small (disadvantaged) business involvement in these past several years.

Statistics supplied the committee by the Department of Defense (DOD is now responsible for approximately 80 percent of the entire Federal purchase budget) indicate that the aggregate amount of subcontract awards to small business and small disadvantaged business are increasing.

Through the first three quarters of fiscal year 1981, 774 large prime contractors reported small business subcontracting commitments of \$8.2 billion and disadvantage small business commitments of \$320.5 million. Through the first nine months of fiscal year 1982, 1,029 prime contractors reported small business commitments of \$9.8 billion (a 22-percent increase) and small disadvantaged business commitments of \$450.6 million (a 41-percent increase).

As a percent of all defense subcontracting, small disadvantage business received 1.5 percent in fiscal year 1981 as compared to 1.7 percent for the first nine months of fiscal year 1982.

However, the percent of defense subcontracts to small business decreased from 38 percent in fiscal year 1981 to 37.7 percent for the first nine months of fiscal year 1982.

At the present time, however, the committee cannot assess the total significance of this percent decrease. Initially, it should be noted that 774 primes submitted subcontracting data last year as compared to 1,029 for the first three quarters of fiscal 1982. This represents an increase of 33 percent in the number of reporting firms. The data, therefore, is not readily comparable. Secondly, DOD has greatly improved its data gathering system and statistics now being reported are more reliable than in the past.

For the two reasons cited above, more empirical evidence is needed before conclusions regarding percent increases or decreases can be appropriately analyzed.

However, certain observations can be validly made on the basis of DOD data submitted for the first three quarters of fiscal year 1982 on completed contracts.

It is apparent that small disadvantaged business goals are omitted from subcontracting plans much more frequently than small business goals, for reasons not fully explained to the committee. In addition, in those contracts having small disadvantaged business goals, actual performance, at least 30 percent of the time, was below goal and for those contracts with small business goals the comparable figure was 21 percent.

However, in 79 percent of the cases where small business goals were met, or exceeded, actual performance averaged 167.5 percent above goal. In the 70 percent of cases where small disadvantaged business goals were met or exceeded, actual performance averaged 158.5 percent of goal.

For *all* contracts completed during this period, actual performance against small business goals averaged 143.2 percent and actual performance against disadvantaged business goals averaged 126.6 percent. [See Exhibit 9.]

Considering the high percentage of cases where goals were not met (i.e., 21 percent for small business; 30 percent for small disadvantaged business) actual achievements averaging between 127-143 percent of goals, raises the strong inference that goals are being set at far too low a level for most DOD contracts.

EXHIBIT 10.—SMALL AND SMALL DISADVANTAGED BUSINESS SUBCONTRACT GOALS AND ACHIEVEMENTS, DOD COMPLETED CONTRACTS

[October 1981 to June 1982; dollar amounts in thousands]

	Small Business	Small disadvantaged business
Total number of contracts with goals	752	490
Number of contracts—Goals not met	156	148
Percent of contracts—Goals not met	21	30
Total amount of subcontracting	\$936,993	\$850,312
Goal amount	\$729,874	\$19,219
Actual amount	\$329,291	\$24,336
Actual as percent of goal, all contracts	143.2	126.6
Actual as percent of goal, contracts where goal was met	167.5	158.7

Source: DOD, companies participating in the DOD subcontracting program, October 1981 to June 1982, p. 1-1A.

CHAPTER 4.—CONCLUSIONS

The committee concludes that :

I. THE 8(a) PROGRAM

A. OVERALL CONCLUSIONS

(1) The 8(a) program has been successful in providing the minority business community with unprecedented access to resources needed for business establishment and development. It is, in fact, the most significant effort of the Government directed to this purpose. Its importance has been clearly established—not only for the minority business economy but for the Nation as a whole. However, we find that there are substantial administrative problems which demand immediate attention if the program is ever to achieve fully its statutory intent.

(2) Although the 8(a) program has been successful in many respects, SBA has historically failed to publicly acknowledge that success and to otherwise demonstrate the more positive accomplishments of the program.

B. ORGANIZATION AND STAFFING

(1) There is an inequitable distribution of employees in the various field offices assigned Minority Small Business Capital Ownership Development (MSB-COD) functions. While the average Business Development Specialist (BDS) portfolio contains 18 section 8(a) firms, in one region the ratio is as high as one BDS to each 39 firms and in another region as low as one BDS for every 8 concerns. Likewise, contract negotiators are not equitably distributed. The national ratio is one negotiator for every 46 firms. However, the ratio among the regions vary from a high of one negotiator for each 99 firms, to a low of one negotiator for every 25 section 8(a) firms.

(2) There is a disproportionate ratio between Central Office and Regional support persons to district office line MSB-COD personnel. Agencywide, the ratio of support to line MSB-COD personnel is 1:1.6.

(3) It is inappropriate to “split” 8(a) program functions between BDS’ and contract negotiators. The purpose of the 8(a) authority is to contribute to the developmental purposes of section 7(j)(10). Section 8(a) contracts are only valid if they relate to that purpose. To have one group of employees, BDS’, responsible for “business development” and another group of employees, contract negotiators, responsible for negotiating 8(a) contracts, is illogical since such contracts are integral to the developmental effort and cannot be considered a separate function.

(4) There is no organized "team approach" to program delivery in most field offices. While the Standard Operating Procedure and internal SBA documents do reference coordination and liaison with other agency divisions, we find no authority which holds such other divisions accountable for providing BDS' the consistent level of support they need for developing the competitive viability of firms receiving section 8(a) contracts.

(5) The Central Office organizational structure of the Bureau of Minority Small Business and Capital Ownership Development is in need of revision. Presently, the Bureau consists of two major program divisions, Capital Ownership Development and the Business Development Division, which report independently to the AA/MSB-COD. However, the Capital Ownership Development program is *the* specific statutory guidance for those efforts needed to overcome the economic disadvantage of qualified firms. The section 8(a) authority can only be validly used to further this purpose. In fact, viewed properly, the statutory scheme makes 8(a) only a subpart of the Capital Ownership Development program effort. These are not autonomous functions. From a management standpoint, therefore, it would be more appropriate to divide the Bureau as follows: A Capital Ownership Development Division, which would have responsibility for section 7(j) (10) and section 8(a); and a Minority Small Business Division, which would have responsibility for section 7(j) (1) through (9), small disadvantaged business subcontracting, program liaison functions, minority business advocacy, economic analysis on issues affecting minority business, and related functions.

(6) The personnel performance evaluations of MSB-COD employees do not adequately measure the extent to which such employees contribute to the success of the 7(j) (10) or 8(a) program effort. There are no appropriate criteria presently in place to measure the success of the program and, hence, employee performance is not being properly evaluated.

C. PROGRAM ENTRY

(1) Program entry criteria pertaining to "economic disadvantage" and "potential for success" have not been reduced to objective evaluation factors, thereby leading to inconsistent determinations by SBA personnel.

(2) SBA's new emphasis to recruit only "high potential firms" for the program should be similarly reduced to a set of objective criteria.

(3) SBA processing of 8(a) applications is too cumbersome, time-consuming, and inconsistent.

(4) The SBA has not conducted a vigorous outreach program for new applicants although it is projected that at least 425 firms will exit the program by March 1983.

D. PROGRAM EXIT

(1) The establishment of Fixed Program Participation Terms (FPPTs) (13 CFR § 124.1-1(f)) violates Public Law 96-481. Such "terms" do not, by definition, relate to competitive viability as required by the statute. Further, the "fixed period of time" referred to in the law is clearly intended to be a "graduation date," *NOT*

another means to exit the program "whether competitiveness is reached or Program Completion action is effected." We find further, that FPPTs will, in effect, negate the incentive of field offices to promote the competitiveness of their assigned portfolios. In fact, FPPTs may render program completion regulations (13 CFR 124.1-1(d)) an administration anachronism.

(2) SBA has not developed any indices of competitiveness for its portfolio of firms. Consequently, it has no reliable means to measure the progress toward competitiveness of its firms (the objective of the program) and, consequently, no objective way to determine when firms should be graduated or terminated for lack of progress. In addition, the failure to develop such indices precludes any valid measure of program success or employee performance and militates against the effective use of other agency resources. Moreover, such indices, if developed, could also assist in making objective program entry decisions since economic disadvantaged and "potential for success" could be determined against such measures.

E. BUSINESS PLANS

(1) Business plans, as presently constituted, are totally inadequate. They do not contain detailed descriptions of why the firm is economically disadvantaged, what objectives or targets must be achieved for business success and, most importantly, a time phased, step-by-step procedure to overcome the noted deficiencies. As a planning tool, we find these "business plans" to be useless.

(2) Section 8(a) contract support levels contained in business plans are not the product of any systematic analysis of what the firm needs to become competitive within a reasonable period of time. Instead, they represent what the firm believes it can obtain in 8(a) contracts and what the SBA may be willing to let it have.

(3) The failure to establish and adhere to valid business plans and projections is the primary reason why SBA has allowed certain firms to become overly dependent on 8(a) contract support.

F. ADMINISTRATIVE OPERATIONS

(1) SBA is correct in its policy determination that BDE should be primarily used for capital equipment acquisition. Yet, we find that the "method" for computing the annual BDE request is inadequate because projections are not based on need but, rather, on empirical usage. Further, BDE should be committed on the basis of need, not on who gets to the BDE "window" first. We further find that limitations on the use of BDE are too restrictive and that districts should be given authority to approve BDE requests. Allocations should be made by the regions to their districts, in addition, so that line personnel can engage in appropriate planning for BDE usage. Given the clearly demonstrated need for BDE, there is no logical reason why 69 percent of the available authority was not utilized in fiscal year 1982.

(2) It is imperative that appropriate safeguards be employed to insure that advanced payments are not misused. However, present limitations may be overly restrictive and time consuming, thereby making the availability of this assistance somewhat questionable.

(3) It is illogical to assume that the dollar value of 8(a) contracts will not be skewed in favor of the larger firms in the program. If the program is working to any extent, these larger firms should be more competitive, that is, be better managed, have a greater productive capacity, a broader capability and a better financial position than their smaller 8(a) counterparts. They are not only *capable* of doing larger jobs but *need* larger jobs to absorb more overhead and otherwise maintain some modicum of profitability. SBA's effort to insure an "equitable distribution" of 8(a) contracts cannot legitimately ignore the economic reality that contract dollar distribution will be slanted in favor of the more mature firms in the program. What is critical is not the distribution of dollars *per se*, but the overall percent of 8(a) support projections which are met—provided, of course, that those projections are based on what the firms need to become competitive.

(4) For the reasons stated in (3) above, it is also illogical to conclude that the dollar value of 8(a) contracts will decrease as a firm proceeds through the program. Once again, as a firm matures and increases its productive capacity, it will be the recipient of increasing larger—not smaller—contracts. What is important for program success is not the absolute dollar volume of 8(a) support, but, rather, the percent mix between 8(a) sales and non-8(a) sales. Toward the end of program completion, non-8(a) sales as a percent of total sales should be approaching 80 percent or better, although the dollar amount of 8(a) contracts may legitimately be more than the amount of such contracts received in the firm's initial program years. SBA, therefore, should be "tracking" and managing the percent mix and not focus on the illusory concept of steadily decreasing 8(a) dollars.

(5) Even though there is a clear need for management assistance, SBA has not utilized all of its available appropriations for 7(j) program activity. In fiscal year 1981, only 43 percent of the available funds were obligated; in fiscal year 1982, only about 57 percent of available funds were obligated. We further conclude that most 7(j) (10) funds are not being used as intended by the statute. Section 7(j)(10) authority is for exclusive benefit of section 8(a) firms and should be used primarily to provide one-to-one counseling assistance. Other efforts directed to disadvantaged business in general should be funded through 7(j)(1)–(9) authority.

(6) Many provisions of the Standard Operating Procedure may, in fact, violate the Administrative Procedure Act since they were never published in the Federal Register for public comment and appear to be substantive rules. In general, however, we find that SBA does not appropriately seek out or consider public views and the opinions of outside experts before adopting major MSB-COD policy changes.

(7) SBA's data collection system on 8(a) program operations is totally inadequate to provide the agency with the information it needs to properly manage the program or to evaluate its success.

(8) SBA has not engaged in vigorous, effective efforts to address the special problems of Native Americans and Asian Pacific Americans. Special program efforts need to be constructed for this constituency as well as an active outreach program to recruit potential 8(a) firms.

G. TRANSITIONAL EFFORTS

(1) There is clearly a need to establish a "transitional program" for 8(a) firms nearing graduation and for those firms which are recently graduated. However, the Interagency Agreement executed by and between the SBA and MBDA is totally inadequate. The agreement is ambiguous, lacks substance and specificity and, basically, leaves both agencies in the same position they were prior to its execution. Further, an appropriate transitional program cannot be effective unless 8(a) program exits are based on the achievement of predetermined standards of competitiveness and not solely on the basis of reaching a FPPT.

(2) The initiation of a tier approach to 8(a) program delivery is inappropriate unless: (a) SBA develop reliable indices of competitive viability; (b) only firms having the same or nearly the same competitive ranking against such indices are competed; (c) competition only takes place during the last 18 months of anticipated program participation; (d) a firm could only be required to compete for a maximum of 50 percent of its projected 8(a) support level; and (e) the firm is to be immediately taken out of the program if, for any reason, it does not receive that amount of contract support needed to insure reasonable progress toward competitiveness.

II. COLLATERAL ISSUES

(1) It would be highly inappropriate to merge the section 8(a) functions of SBA into MBDA. Such a merger would disrupt services to the minority business community, diffuse responsibility for a full service approach to program delivery, and vest the operations of a highly complex program in the hands of an agency (MBDA) which has not adequately proven that it can appropriately manage the limited programs it has now.

(2) The intent of the 8(a) and 7(j)(10) programs are to create competitive business owned and controlled by the socially disadvantaged. As long as an 8(a) firm is making adequate progress toward the achievement of competitiveness it should not be "thrown-out" of the program merely because it exceeds SBA's definition of size applicable to all businesses generally. An 8(a) firm's gross receipts and employment are artificially inflated by 8(a) sales and such sales are not, by definition, indicative of the firm's ability to compete. Whereas, size standards in use for all other procurement programs are implicitly designed to screen out the more powerful firms from the less powerful. It is not logical to enter 8(a) sales into this equation since they are not indicative of competitive prowess and will result in premature program exits—i.e., exits before the firm becomes competitive—and, therefore, defeat the purpose of the program. A permanent size standard should be developed which recognizes the particular intent of the 8(a) and 7(j) programs. "Small" cannot be defined fairly by reference to remedial assistance especially when the standard is designed to differentiate between those that are dominant and those that are not. However, the committee also notes that *if* SBA had reasonable size

standards and *if* business plan projections were both reliable and geared to competitive viability, the present problem would not exist at all.

(3) The draft Federal Acquisition Regulations which propose that "likely costs" be the base price for 8(a) contracts will, if implemented, result in numerous requirements being returned to buying activities and, in addition, divert substantial sums of BDE for price differential payments.

II. THE SUBCONTRACTING PROGRAM

(1) The subcontracting program has had limited success during its first four years of implementation. Its importance to the small and small disadvantaged business community has been clearly demonstrated yet, we find that Executive agencies of the Federal Government have been clearly derelict and have not implemented the program in a manner totally consistent with the statute nor congressional intent.

(2) There is virtually a total lack of any initiative on the part of the Executive branch to institute sanctions or remedies against those large prime contractors who have violated the law. It appears that Federal agencies have subordinated this program to all other objectives of the acquisition process. Federal procurement personnel, in addition, have not been held fully accountable for their mismanagement.

(3) The Small Business Administration is primarily responsible for the poor implementation of the subcontracting program. In specific, SBA has not:

(a) Assumed an aggressive role of coordinator among the agencies for uniform and consistent application of the law;

(b) Assumed an aggressive posture with respect to imposing sanctions on violators;

(c) Engaged in any substantive activities either to inform small business about potential subcontracting opportunities, or to "qualify" small businesses as potential subcontractors;

(d) Properly coordinated its review function with cognizant contract administration officers;

(e) Devised a reporting system to capture statistics on those contracts which do not have plans but which, by law, must have plans;

(f) Devised a logical system for the identification of contracts or contractors to be reviewed; and

(g) Assigned a sufficient number of personnel to administer the subcontracting program at the central office level.

(4) Present contract clauses and procurement regulations are not adequate because they fail to specify the specific consequences flowing from the breach of a subcontracting plan. In addition, even though the plan is a material term of the contract, a breach of the plan is treated differently under present procurement regulations than other material breaches.

(5) There is a lack of consistent and uniform interpretation of both the statute and implementing regulations by various Federal agencies. In fact, we have found inconsistencies within a *single* agency. We are constrained to conclude, therefore, that the top management of many agencies either have not been fully informed of program problems or have ignored those problems when brought to their attention.

(6) The National Advisory Committee on minority and small business subcontracting established by section 7(j)(3) of the Small Business Act has not assumed an aggressive posture in fulfilling its statutory mandate. The Advisory Committee has not received proper guidance from the SBA. We find further, that SBA has failed to properly execute its mandate under section 7(j)(3) by not providing incentives and assistance to private sector firms to train and upgrade potential small business subcontractors.

(7) It would be inappropriate to amend the statute to permit annual as opposed to contract-by-contract plans. Annual plans, we believe, will not contain reliable goals since they are based on projected contract awards. Accountability would be lost. Further, if annual plans were required, the Government would not have available any practical effective remedy. However, suggestions regarding a limited pilot program with a limited number of DOD prime contractors, is worthy of further exploration by the committee. But, in order to effectively evaluate any pilot program it is, of course, necessary that the present requirements of the law be enforced for a sufficiently long period of time so that a valid comparison can be made.

(8) Quarterly reports on a contractor's activity (SF 295) are needed to properly manage the program.

(9) "Flow down" plan requirements are not being effectively implemented by either prime contractors or the Government.

(10) When issuing guidance on the implementation of section 211, the Office of Federal Procurement Policy is more responsive to the interest of large business and the Federal bureaucracy than to minority and small business concerns. The Office is constantly reacting to pressure from government agencies and big business instead of affirmatively *acting* to promote and foster the interest of the small business community.

CHAPTER 5.—RECOMMENDATIONS

On the basis of all evidence received, further investigations by the committee, and the review of all available data, the committee recommends:

I. THE 8(a) PROGRAM

A. THE SMALL BUSINESS ADMINISTRATION

Organization and staffing

(1) Merge the functions presently being performed by persons occupying the titles of Business Development Specialist (BDS) and Contract Specialist (Negotiator) into one classification and job title. Under this new title the employee would be responsible for both business development and contract negotiation for an assigned 8(a) portfolio. This system would, with SBA's present complement of BDS' and Contract Negotiators, result in a ratio of one employee for every 14 section 8(a) firms. Adequate training, of course, must precede this transition in program operation.

(2) Insure the equitable distribution of MSB-COD personnel in the field based upon the portfolio size of the district office.

(3) Review the number of regional "support" personnel assigned to the MSB-COD program effort and their relative functions to insure that there is not a disproportionate ratio between regional support and district line personnel.

(4) Institute a "team approach" for 8(a) program delivery in each district office. Each BDS/Negotiator (see Recommendation 1) should have a processing loan officer and a management assistance officer assigned to his or her portfolio. These persons should not only provide the BDS/Negotiator with such assistance as may now be required under the SOP, but they should also provide the BDS/Negotiator with quarterly reports on firms within their assigned responsibility. These reports should provide the BDS/Negotiator with a recitation of why the firm remains economically disadvantaged from a financial and management standpoint, and, secondly, should contain a "plan of action" for addressing each noted deficiency. Thereafter, the BDS/Negotiator should be given the responsibility and authority for selecting and marshalling both internal and external agency resources to achieve the plans of action. In addition, the BDS/Negotiator should be responsible for the entire marketing phase of program implementation including, of course, the formulation and execution of a plan to achieve the optimum level of sales, non-8(a) market penetration, and other marketing objectives.

(5) Measure the performance of BDS/Negotiators, to the extent possible, by how well their assigned 8(a) portfolio proceeds against predetermined criteria of competitive viability. In addition, management assistance officers and processing loan officers having an assigned

8(a) portfolio, should also be evaluated, in part, on the timeliness and quality of their reports to the BDS/Negotiators.

(6) Reorganize the Central Office Bureau of Minority Small Business and Capital Ownership Development. We suggest two major program divisions: Capital Ownership Development, which would have responsibility for section 7(j)(10) and section 8(a); and a Minority Small Business Division, which would have responsibility for section 7(j)(1) through (9), small disadvantaged business subcontracting, program liaison functions, minority business advocacy and economic analysis on issues of particular importance to minority business.

Program entry

(7) Formulate objective standards for programs entry pertaining to "economic disadvantage" and "potential for success." These standards should be measures of where the firm placed against predetermined criteria of competitive viability. If the criteria are properly formulated, the agency can validly conclude that firms which score exceedingly high are not in need of 8(a) assistance; and firms which score exceptionally low, probably have a low likelihood of program success and should be rejected. However, such a new system should not be formulated without extensive comment from the public, input from independent private sector experts and close consultation with the Small Business Committees of the Congress.

(8) Expedite the process for approval of 8(a) program applications. We suggest the imposition of fixed time limitations on District, Regional and Central Office personnel that participate in the approval process. At a maximum, we suggest a total of 30 working days, after receipt of all required information from the applicant, for program entry decisions.

(9) Formulate and implement a vigorous outreach program as mandated by section 8(a)(10) of the act, to recruit firms for the program. This outreach effort should have particular emphasis for businesses owned by Native Americans and Asian Pacific Americans.

Program exit

(10) Immediately repeal 13 CFR §124.1-1(f) which establishes Fixed Program Participation Terms (FPPT's). Such "terms" are clearly violative of Public Law 96-481 which required the formulation of "graduation dates" and *not* the creation of yet another vehicle to exit the program whether or not competitiveness is reached. In lieu of FPPT's, SBA should establish criteria of competitive viability in each major business area of finance, management, and marketing. Progress against these criteria should be monitored and promoted by SBA resources. When a firm achieves most of its assigned criteria in each of the three major business areas, the graduation process should be implemented. If a firm's performance at any point in time is so poor, or if there is a sustained lack of progress over a 3-year period, termination proceedings should be commenced. Such a system will not only allow for more objective program entry decisions (see Recommendation 7), but also: (a) permit SBA to project reliably numbers of firms graduating in subsequent years; (b) allow for the precise identification of financial, management and marketing weaknesses of the portfolio and, therefore, make informed decisions about

the allocation of resources; (c) measure the success of the program; (d) better evaluate employee performance; and (e) clearly inform the 8(a) firm of what progress is expected, in which business areas, and over what period of time. "Surprise" terminations and graduations would be eliminated. In formulating competitive criteria, we further recommend that SBA administratively adopt the system recited in H.R. 6823 (97th Congress).

(11) Revise all business plan forms. These forms should be revised so that they can, in fact, be used as planning tools. The new forms should contain the competitive criteria referred to in Recommendation 10, detailed descriptions of why the firm remains economically disadvantaged in the financial, management and marketing areas (i.e. an assessment of performance against the criteria), a detailed and time-phased step-by-step plan of action to overcome noted deficiencies, and a recitation of what resources SBA will commit to the effort. Such plans of action should be reviewed quarterly, with *major* reviews scheduled once a year.

Administrative operations

(12) Continue its present policy of using Business Development Expense (BDE) primarily for capital equipment acquisitions.

(13) Allocate BDE to each district office which has an 8(a) portfolio. Such allocations should be based on projections from the districts which are formulated on the basis of need. In other words, the districts should be required to review the Business Plans in its portfolio and assess the capital equipment needs of its firms by determining that equipment which would most likely improve the firm's performance against its predetermined competitive criteria. The projections should be submitted through the Regions to the Central Office. Thereafter, each district should be informed of their respective allocations at the beginning of the fiscal year so that appropriate planning for BDE commitments can be made. Districts, in turn, should be delegated the authority to approve BDE for its 8(a) contractors under guidelines to be established by Central Office and within the overall limitations of their allocations. Further, BDE should be fully utilized in amounts approved by the Congress.

(14) Not restrict the use of BDE to a specific 8(a) contract. BDE for capital acquisitions should also be approved, in appropriate qualifying situations, if the contract is commercial or a non-8(a) Government contract.

(15) Review its procedure regarding both the processing of advance payment requests and the limitations on delegated approval authority. With respect to processing, strict time limits should be imposed on processing personnel from the time all appropriate information is received from the applicant concerned. We suggest a total of 10 working days, unless exigent circumstances warrant a more expeditious review. Where appropriate increased approval authority should be delegated to field offices.

(16) Utilize 7(j) (10) authority to provide one-on-one management and technical assistance to the 8(a) portfolio. Properly viewed, 7(j) (10) was intended to provide 8(a) firms the individual assistance they need for competitive development. Instead, we find that field offices are, in effect, precluded from using 7(j) (10) for these purposes. If a

"team approach" for program delivery is implemented (see Recommendation 4) 7(j)(10) assistance could be used to provide the specialized expertise that the district's personnel may be lacking. This authority could also be legitimately used to promote the transitional efforts of these firms approaching graduation by providing the highly technical assistance sometimes required to qualify as a subcontractor to a Government prime contractor. (See Recommendation II. C-2.) We further recommend that 7(j) funds be fully utilized by SBA in amounts appropriated by the Congress.

(17) Publish in the Federal Register for public comment all substantive provisions relating to the operations of both the section 7(j)(10) and section 8(a) programs. The SOP should not be utilized to circumvent the rulemaking process.

(18) Revise and expand its data system on 8(a) program operations. We believe there are two basic areas where this effort should be directed: (a) contract identification and matching against projections, and (b) status of portfolio, i.e., the identification of descriptive data on the portfolio (e.g. SIC distribution, number of employees, geographic location, etc.) and the identification of critical elements of program performance (e.g. 8(a)/non-8(a) mix, and other aggregates pertaining to progress against predetermined criteria of competitive viability).

(19) Engage in specific efforts to identify the special problems of Native Americans and Asian Pacific Americans, and to address those problems with affirmative measures.

Transitional efforts

(20) Develop a "tier approach" to 8(a) program delivery according to the criteria recited in Conclusion I. G-2 of this report.

(21) Develop a transitional effort for firms nearing graduation and for those firms recently graduated. For firms nearing graduation, in addition to participation in the tier effort specified in Recommendation 20, SBA could also use 7(j)(3) and 7(j)(10) authority to qualify such firms as potential subcontractors, award multiyear 8(a) contracts, and otherwise provide intensive management, financial and marketing assistance, directly and in cooperation with private and public sector organizations. With firms recently graduated, assistance offered should include, in addition, specialized efforts in the areas of access to equity capital, technological transfer, international trade and similar more sophisticated efforts. Cooperative agreements with other agencies and departments are needed as well as with State and local governments and private sector organizations. SBA should assume primary responsibility to monitor the progress of these "graduates" and to ease their entry into the competitive market. We further recommend that the progress of these firms be monitored for at least 2 years after graduation. The committee is mindful, however, that unless the 8(a) program is redirected toward the purpose of economic development, as is recommended by this Report, these transitional efforts will not produce any substantive result. FPPT's will cause the exit of firms who are not ready to compete and, therefore, transitional efforts will be attempting to move firms into competition before they are competitive. Under such conditions, failure can be the only logical expectation.

(22) Promulgate a size standard for 8(a) participants which provides that gross receipts or employment attributable to the performance of 8(a) contracts shall not be considered when computing size.

(23) Report to this committee by February 15, 1983 all actions taken to comply with Recommendations I-A (1) to (22).

B. THE OFFICE OF FEDERAL PROCUREMENT POLICY

(1) Amend the proposed Federal Acquisition Regulations to provide that the fair market price for 8(a) contracts shall be based on "reasonable" as opposed to "likely" costs.

(2) Report to this committee by February 15, 1983, all actions taken to comply with Recommendation I-B (1).

C. THE CONGRESS

(1) Disapprove of any proposed merger of SBA programs or activities into the Minority Business Development Agency.

(2) Favorably consider proposed legislation which: (a) Repeals section 106 of Public Law 96-481; (b) establishes criteria of competitiveness designed to measure a firm's progress or lack of progress toward a competitive position; (c) reaffirms that there are only three exit vehicles from the program: voluntary withdrawal, completion, and termination; (d) makes program completion a function of progress against the predetermined criteria of competitiveness, and (e) establishes an equitable size standard for 8(a) firms.

II. THE SUBCONTRACTING PROGRAM

A. THE PRESIDENT

Establish an interagency coordinating council on the implementation of section 211, to be comprised of representatives of the Office of Management and Budget, the Office of Federal Procurement Policy, Department of Defense, General Services Administration, National Aeronautics and Space Administration, and the Small Business Administration. The President should instruct this Council to recommend, by June 1, 1983, standardized guidance for use by all Federal agencies. Such recommended guidance should provide for at least the following:

(1) Uniform "checklists" to assess the acceptability of subcontract plans and to evaluate contractor performance under plans;

(2) Uniform guidelines which specify how frequently prime contractors should receive program audits;

(3) Uniform guidelines which provide that plans contained in very large prime contracts should be more likely to be reviewed than plans in smaller contracts which meet or barely exceed the minimum threshold contract amount of \$500,000 or \$1 million, if construction;

(4) Uniform procedures to insure that, to the maximum extent practicable, SBA conduct joint reviews with the cognizant contract administration agency;

(5) Uniform instructions for the completion of all forms which may be needed to monitor prime contractor performance;

(6) Uniform procurement regulations which specify the exact procedures to be followed by the ACO and the Procurement Contracting Officer (PCO) upon their determination or upon notification by SBA that a prime contractor is in noncompliance with a subcontracting plan, and that these procedures are at least as stringent as other procedures presently in use which pertain to the breach of other material contract terms;

(7) Uniform contract clauses to be inserted in all contracts to which section 211 applies, and which specify both the procedure the Government will follow and the potential remedies available upon a determination that the subcontracting plan has been violated;

(8) Uniform procedures for the implementation of the "flow-down" requirements of section 211. While these procedures may allow for the Government to monitor the performance of large subcontractors when the Government has already established a "presence" at the subcontractor's place of business, the obligation of the prime contractor to review and approve the flowdown plans of its subcontractors cannot be legally avoided; and

(9) Uniform guidance on the use of incentive clauses, provided that such guidance should be broad enough to allow for the creative use of this authority, and should provide for a system of review and analysis so that the most effective use of the incentive clauses may, within a reasonable period, be determined.

B. ALL FEDERAL BUYING AGENCIES

(1) Report to this committee on a quarterly basis, the following information:

(a) Number and dollar value of contracts awarded during the quarter which contain subcontracting plans;

(b) Number and dollar value of contracts awarded during the quarter which do not contain plans, but which, by law, should have plans;

(c) The number of plans reviewed by SBA during the quarter; the number SBA found deficient and the number and dollar value of contracts awarded which contained plans which SBA noted as being deficient but which were not corrected to SBA's satisfaction; and

(d) The total number and dollar value of all subcontracts awarded during the quarter and the dollar value and percent of subcontracts awarded to small business and to small disadvantaged business.

(2) Provide SBA with adequate and timely information with respect to the award of contracts covered by section 211.

(3) Commence contract debarment proceedings against any contractor who is determined to have violated more than one plan. Exceptions should only be made by the President upon a finding that national security will be impaired if the contractor is debarred. In such a case, other severe remedies must be imposed.

(4) Include in the personnel performance standards of all ACO's and PCO's stringent requirements for the expeditious and vigorous enforcement of the subcontracting program. Such a standard should

be denominated as "critical" so that failure to achieve the standard can result in separation from Federal service.

(5) Report to this committee by February 15, 1983 all actions taken to comply with recommendations B1 through B4.

C. THE SMALL BUSINESS ADMINISTRATION

(1) Assign a sufficient number of personnel to properly administer the subcontracting program at the Central Office level. At a minimum, we recommend that at least 10 full-time professionals be assigned these functions;

(2) Establish programs on its own, and in cooperation with large prime contractors, to "qualify" small and small minority owned firms as potential subcontractors. We suggest that 7(j) funds be utilized to employ the services of engineers or other specialists to provide the highly technical services which are needed. We further recommend that 8(a) firms be afforded priority in this new program effort;

(3) Establish a formal program for the dissemination of information on subcontracting opportunities to potential small subcontractors;

(4) Devise a reporting system to capture the number of contracts awarded without plans but which, by law, should have plans;

(5) Include in its annual subcontracting report to the Congress the names of contracting officers who have awarded contracts containing plans which, in SBA's opinion, are deficient or who have awarded contracts, subject to section 211, which do not contain plans;

(6) Assume a far more aggressive role to forcefully implement the subcontracting program in a consistent and effective manner throughout Government and, if substantial progress is not made in this regard, consider replacing the present top management of the program;

(7) Redirect the efforts of the National Advisory Committee to achieve the purposes set forth in section 7(j) (3) of the Small Business Act. It is further recommended that the agency develop a plan in concert with the Advisory Committee to provide incentives and assistance to large business concerns to train and upgrade eligible small businesses so that these small firms may receive private and public sector subcontracts; and

(8) Report to this committee by February 15, 1983, and on a quarterly basis thereafter all efforts undertaken or planned to comply with recommendations c(1) through c(7).

MINORITY VIEWS—8(a) REPORT

While we agree with the need for Congressional oversight of the Small Business Administration's 8(a) program, we find this report to be inadequate and deficient in a number of respects. It fails to address serious problems in the 8(a) program. It is not supported by the hearing record. It does not acknowledge the problems faced by SBA in the agency's attempts to clean up the program. It does not even accurately interpret the statutory purposes of the program. Its recommendations infringe on administrative discretion and often would be counterproductive if adopted. For these reasons, we forcefully express our dissent to this report.

Hearing record

Before discussing the substantive weaknesses of this report, it is important to place it in the context of the hearing record. The only hearings held by the subcommittee on the 8(a) program took place 18 months ago. That three-day series of hearings was specifically intended to discuss SBA's recently proposed revisions to the 8(a) regulations. No hearings have been held on any other part of SBA's minority business development activities, and no hearings have been held since SBA's substantially modified final regulations took effect. There were no hearings whatsoever on the subcontracting program, which is a major portion of this report's focus. The additional hearings cited as the basis for this report were not addressed to the 8(a) program. Rather, they were field hearings held in an attempt to ascertain the state of small business in various locations throughout the nation. While there was scattered testimony in these hearings regarding SBA's minority business programs, these statements are hardly a basis for this sweeping report.

The lack of an adequate hearing record is apparent throughout the report. There are only a very few scattered references to the hearing record. Although there is a large volume of raw data contained in the report, almost none of it was presented in the course of subcommittee hearings. This information has never been subjected to the normal scrutiny and analysis of the hearing process. As a result, many of the conclusions and recommendations are conclusory at best—and often totally unsupportable. There is a quantum leap from the raw data to the final conclusion without any attempt to analyze what the data really means.

Purposes of the 8(a) program

The report presents a lengthy discussion of the statutory history of the 8(a) program, covering almost 30 years of history. It is here, however, that the report is fundamentally flawed as it misinterprets the intent of Congress. The report seems to conclude that the program should create businesses and virtually guarantee their success. A careful look at the statutes creating the 8(a) program, clearly lead to a different conclusion. Public Law 95-507 and 96-481, which are the statutory framework for the 8(a) program, place an emphasis on providing help, but not guaranteeing success.

Public Law 95-507 unequivocally established the primary purposes of the 8(a) program: to "foster business ownership" by socially and economically disadvantaged individuals and to "promote the competitive viability" of such firms owned by such individuals. The use of the words "foster" and "promote" evidence a clear intention that the purpose of the Act is to encourage and assist in the development of minority businesses and to provide tools to help in the development process.

Throughout the report, it is assumed and even specifically stated that the purpose of the 8(a) program is to create competitively viable minority businesses and that firms must remain in the program until they have reached "predetermined criteria of competitiveness." Such a purpose does not comport with the statutory purposes of the Act nor is it consistent with the Congressional finding that the "opportunity for full participation in our free enterprise system is essential," that

adverse conditions can be improved by providing the maximum practicable opportunity for the development "of disadvantaged firms and that such development can be materially advanced" through government procurements. Nowhere in the law nor in the legislative history is it suggested that the 8(a) program is intended to create viable businesses or insure successful business operation in a competitive free economy.

There are a multitude of factors—local, regional and national—that can affect the competitiveness of any business. Interest rates, market opportunities, technical expertise, management abilities, government activity, and general economic conditions are but a few of the variables facing all entrepreneurs. In such an uncontrollable environment, government cannot insure success for each and every business. However, the government should be expected to provide the opportunities, intended by law and so designed, to enhance the disadvantaged firm's chances for growth, experience and success.

When Congress enacted Public Law 96-481 in 1980, it directed SBA to "assist small business concerns . . . to develop comprehensive business plans with specific targets, objectives, and goals for correcting the impairment of such concern's ability to compete . . . within a fixed period of time. . . ." Nowhere in the law or its legislative history is there any indication that Congress intended SBA to guarantee success at the end of the firm's fixed term. Most will agree that it is beyond the ability of the government to guarantee success. Toward that end, and in an attempt to provide assistance to as many disadvantaged businesses as possible, it is a reasonable administrative interpretation of the law to set a maximum term in which the opportunity for business development is enhanced through the directed application of government contract assistance as well as financial, technical and management assistance. It is reasonable to expect the SBA to use all practical means to assist disadvantaged businesses.

Past abuses

While the 8(a) program objectives are essential for a free nation, their implementation has often been disastrous. The program's history is littered with scandal and abuse. Far too often, the program has been used as a political tool for rewarding friends or wooing the affection of various interest groups. With an imperfect history, it is not surprising that the program has as many foes as this one does.

These abuses have led the General Accounting Office to criticize the 8(a) program frequently. Its most recent comprehensive report, entitled "The 8(a) Program—A Promise Unfulfilled" (CED 81-55) issued in April of 1981, is perhaps the best description of the problems in 8(a). The report concluded that "The program has done too much for too few for too long." (p. 6) While recognizing that a properly administered program is indeed meritorious, GAO stated that the "program should be structured so that the opportunity to participate is distributed more equitably over a larger universe of disadvantaged firms." (p. 35) Unfortunately, the GAO was not invited to testify at the subcommittee's hearings, even though its report was issued only a month before the beginning of the hearings.

One current example demonstrates the abuses which have cost the 8(a) program so dearly, both financially and in terms of political sup-

port. The program is intended to assist small and disadvantaged businesses in becoming commercially self-sufficient. However, the largest 8(a) contractor now in the program (with almost \$200 million in sales) was for seven years virtually a subsidiary of one of the largest corporations in America. Unfortunately, the report fails to mention the many complaints from small businesses that claim they are being significantly harmed because of the contract opportunities they lose to 8(a).

Fixed program participation terms

The report's strongest criticism is directed toward SBA's regulations creating a Fixed Program Participation Term (FPPT). FPPTs are declared to be "incomplete contravention of P.L. 96-481." We disagree with the statement. When the current Administration took office, it was presented with a statutory deadline of April 21, 1982, by which time it was required to negotiate a fixed termination date for every program participant. Since no termination dates had been negotiated by the previous Administration, firms without termination dates would have been excluded automatically from the program by operation of the statute. The FPPT system was chosen as the only reasonable means of negotiating a date with every 8(a) participant by the April 21 deadline. Although it is reasonable to disagree over the methods of negotiation used by SBA or the terms provided to some specific firms (both too long and too short), it must be recognized that there were few other options available to the agency.

The report suggests that SBA exceeded its authority by "automatically terminating" some 385 firms which failed to negotiate a FPPT. We note that Public Law 96-481 required both the submission of a revised business plan within a specified time period and establishment of FPPT's by April 21, 1982, without exception. We find it disingenuous to suggest that when SBA simply followed the terms of the law, it exceeded its authority. Firms that never replied to SBA requests for information and negotiation were determined as having failed to comply with the law and therefore lost their program eligibility. Further, it should be noted that while the average FPPT negotiated for incumbent firms was in excess of three years, the average prior period of participation in the 8(a) program for those firms was over 5 years. Thus, the average length of participation in this program for those firms will ultimately total in excess of eight years, not considering the possible extensions which may be granted. In our opinion, this is not a capricious or excessive abuse of authority.

It must also be recognized that this process was not carried out in a vacuum. The very points raised in this section of the report were the subject of recent litigation in the case of *Minority Business Legal Defense and Education Fund, Inc. v. Small Business Administration*, (U.S. District Court, District of Columbia). In an opinion filed on September 28, 1982, the Court upheld the FPPT regulations, reaffirming the SBA's "broad discretionary authority to promulgate rules and regulations necessary to effectuate the purposes of the Act." The opinion supported SBA's view that the statutory purpose "To 'promote' competitive viability is not to guarantee it." The Court concluded that the regulations were indeed based on consideration of the relevant factors and were not affected by a clear error of judgment. In

addition, the FPPT procedural bulletin was found to be exempt from the notice and comment requirements of the Administrative Procedures Act "as an interpretive rule, general statement, or internal procedure."

Program personnel

The report makes a number of very specific conclusions regarding the allocation of 8(a) program personnel within the agency (even though there was almost no discussion of this subject in any hearing). Another look at how CBA allocates its minority business personnel shows that there may be other considerations which may explain the concerns expressed in the report. For example:

The report recommends the merging of the BDS and Contract Specialist functions into one job title. However, we wonder if the cost of retraining and time lost might not indicate future dual capacity hiring instead of retraining now. Government contract negotiations are so highly specialized that we fear the training costs would be prohibitive. We would be interested in learning the views of the SBA on this and other team approaches.

Many of SBA personnel actions cited by the report were intended to ease inequitable distribution of staff. For instance, many of the temporary "details" were assignments of Central Office personnel to the Washington District Office which had one BDS to every 49 firms at one time, the highest in the nation. The drafters of the report seem to forget the scores of cartons containing untouched 8(a) applications that greeted the incoming administration. We are advised that the SBA is working to resolve this and other similar problems on a permanent basis but must do so within the limitations necessitated by budgetary restraints.

The so-called "disproportionate ratio between regional support and district line personnel" does not take into consideration the fact that many of the regions are not decentralized and actually perform various "line" functions such as contract negotiation and execution.

The report recommends that the rating of SBA personnel performance for evaluation be tied to the progress of portfolio firms using an amorphously defined "predetermined criteria of competitive viability." This proposal assumes that the business development specialist is responsible for or could control the myriad of unpredictable factors which affect the development of any business. The earlier referenced GAO report makes it clear that the business development specialist does not now have "enough time to do all the tasks required. . . ." And, indeed, as the report pointed out, the 8(a) firms themselves do not find that they are inconvenienced by the lack of services due to their view that the program is mainly a vehicle to obtain 8(a) contracts. Even if the BDS-to-firm ratio were 1:1, experience indicates that an independent entrepreneur may not seriously heed the advice of a government employee as to the daily operation of this business or the course of the firm's development. SBA can recommend appropriate development paths but cannot force a firm to accept them. But most importantly, this proposal continues the theme that SBA should guarantee the success of disadvantaged firms.

Subcontracting program

A major portion of the report discusses weaknesses in the minority subcontracting program mandated by Section 211 of Public Law 95-507. This is done in spite of the fact that no hearing was ever held on this program in the 97th Congress. There have been a few unsubstantiated allegations of problems in the subcontracting program. However, the subcommittee has had no opportunity to review the program. Therefore, we do not know whether there are serious deficiencies. Likewise, we cannot pass judgment on the report's recommendations. While some may appear to have merit, there has been no opportunity to evaluate them or subject them to the test of the hearing process. We believe it is entirely inappropriate for this committee to pass judgment on matters which have been given no prior attention.

Conclusion

Unfortunately, this report and its recommendations are so fatally flawed that they cannot reasonably provide constructive guidance to the agency in its administration of the minority business programs. There is a need for effective Congressional oversight of this program. However, this report does not meet that need since it fails to address many of the important issues beginning for attention. Indeed, the report fails to even recognize the need to address the abuses of the past in order to overcome its serious credibility problems. If the 8(a) program dies, it will not be because of agency attempts to tighten its management of the program. Rather, it will happen because of the unwillingness of those involved to acknowledge the need for a tightly run program free from abuse and controversy.

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